CONTENTS

KARLO GODOLADZE
Researcher and Lecturer at Ilia State University,
School of Law, The Center for Constitutional Studies.

TOWARDS SUBSTANTIVE AND PROCEDURAL MODUS OPERANDI —WHY DID CONSTITUTIONAL REFORM FAIL IN GEORGIA?

'Thoughts without concepts are empty, intuitions without concepts are blind'
Immanuel Kant, Critique of Pure Reason[1]

PRELIMINARY INSIGHTS

On February 12, 2016 held the fifth and concluding meeting of the Working Group on the Issues of the Parliament, the President, and the Government of Georgia. The working group was one of the central units of Georgia's third State Commission for Constitutional Reform. The other foundational or core working groupings of the Commission included the Working Group on the Issues of General Provisions and Revision of the Constitution of Georgia; the Working Group on the Issues of Human Rights and Freedoms, the Judiciary, and Prosecuting Institutions; the Working Group on the Issues of Independent Constitutional Institutions; and the Working Group on the Issues of Territorial Arrangements and Local Self-Government.[2]

The first such kind of quasi-constituent body or assembly worked during 1993-1995 and the second one accomplished its mandate throughout 2009-2010.[3] The outcome of this work was

1 See Seyla Benhabib (2016). The new Sovereigntism and Transnational Law: Legal Utopianism, Democratic Skepticism and Statist Realism Global Constitutionalism, 5, pp. 109-144
2 See Official web page of the State Constitutional Commission of Georgia http://constcommission.ge/en/about Details for legal background and other formal issues (last visited June 26, 2016)
3 See Parliamentary Assembly of the Council of Europe. Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) Honouring of obligations and commitments by Georgia, Information note by the co-rapporteurs on their fact-finding visit to Tbilisi (22-24 March 2010) Co-rapporteurs: Mr. Kastriot ISLAMI, Albania, Socialist group, and Mr. Michael Aastrup JENSEN, Denmark, Alliance of Liberals and Democrats for Europe Chapter II – Constitutional Reform, Available At http://assembly.coe.int/CommitteeDocs/2010/20100624_amondoc24rev_2010.pdf (last visited June 26, 2016)

the second Constitution of Georgia, adopted on 24th of August 1995. The second was the major revision of the supreme politico-legal act on October 15, 2010. At this date, the Parliament of Georgia passed a bill including all of the constitutional amendments after working with the Venice Commission of the Council of Europe and other international actors and stakeholders. These amendments and addenda entered into legal force and were implemented after the inauguration of the fourth elected president of the Georgian polity on November 17, 2013.[4]

As regards the first Constitution of Georgia, it embraced on February 21, 1921 and was one the first European Constitution, which guaranteed and implemented the Social Democratic Republic in practice.[5] As foreign and Georgian scholars and officials elucidated, the first Constitution of Georgia eloquently empowered its citizenry with the equal franchise and endorsed a concept of naïve secularism that was inspired by the French notion of laïcité or laïque (state neutrality for religion).[6] Overall, it formulated a progressive narrative of human rights within twentieth-century constitutionalism.[7]

The first significant amendments to the second 1995 Georgian Constitution occurred on February 6, 2004 just after two months after Georgia's Rose Revolution. In purely constitutional terms, this was a vivid demonstration of the so-called instrumental use or instrumentalization of the constitution from the new post-revolutionary leadership.[8]

---

4 See Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia. Adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010) http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)028-e See also OSCE Review Conference – Human Dimension Session, Georgia: Constitutional Reform June 2009 – October 2010, Information Note – Distributed by the Delegation of Georgia, Warsaw, 30 September – 8 October 2010, Working Session 1 available at http://www.osce.org/home/71611?download=true (last visited June 26, 2016).

5 See Papuashvili George. A Retrospective on the 1921 Constitution of the Democratic Republic of Georgia Engage Volume 13, Issue 1, March 2012 http://www.fed-soc.org/publications/detail/a-retrospective-on-the-1921-constitution-of-the-democratic-republic-of-georgia (last visited June 26, 2016).

6 See more respecting 'laic-republican legacy' and its dimensions in the contemporary French constitutional discourse. Daniel Augenstein (2013). Normative Fault-lines of Trans-national Human Rights Jurisprudence: National Pride and Religious Prejudice in the European Legal Space Global Constitutionalism, 2, pp. 475-479

7 Ibid, Papuashvili George (2012) See also Godoladze Karlo (2015). Constitutional Theocracy in Context: The Paradigm of Georgia, Humanities and Social Sciences Review, State-Church historical Relationships and Soviet Legacy, pp. 200-202 Available at http://universitypublications.net/hssr/0402/pdf/E5X76.pdf (last visited June 26, 2016).

8 See Meladze Giorgi & Godoladze Karlo. Instrumentalization of the Constitution: Story of post-revolutionary constitution-making Accepted Research Paper for the 9th International Congress of Constitutional Law (Oslo, Norway) https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws11/w11-meladze&godoladze.pdf (last visited June 26, 2016).

Between the first alteration to the Constitution of Georgia on July 20, 1999 and the entire package of constitutional amendments which entered into force on November 17, 2013, there was an indisputable pattern of 'malleable constitutionalism'.[9] Notably, as some scholars argue, the very term firmly illustrates *the politico-legal bedrock in the polities, where the ruling political party or coalition unilaterally captured and thoroughly dominated*, both procedurally and substantively, in the field of constitution-making or revision. Furthermore, constitutional changes passed without bipartisan support or the general public's *consultation* or acceptance.[10]

The substantive content of constitutional amendments adopted in 2010 covered a wide range of institutional and substantive issues and made an across-the-board impact. *Inter alia* reformulated the institutional framework of Governmental institutions; developed the checks and balances system among the branches of Government; and enhanced and strengthened the independence of the judiciary (by proposing tenure appointments of judges for probationary periods, maximum three years).[11]

Constitutional reform redefined the constitutional clauses for private property, created a new constitutional chapter on local self-government, affirmed the European subsidiarity principle and advanced the role of political parties in decision-making in order to encourage inclusiveness and responsiveness within the wider institutional framework. At the same time, critics pointed to the inter-institutional relationships between executive and legislative branches and the *sui generis* arrangements of confidence, no confidence and constructive vote of no confidence constitutional clauses.[12]

Immediately after the Working Group on the Issues of the Parliament, the President, and the Government completed its work, the chairperson and head of the Legal Affairs Committee of the Parliament of Georgia delivered a statement articulating the challenges confronting the future of the State Commission for Constitutional Reform. The statement further elucidated the divisions between the governing coalition and the opposition regarding specific constitutional issues and, given this context, emphasized that there was no likelihood of achieving the procedural quorum and political reconciliation necessary to reform the constitution.

---

9 Originally, see Po Jen Yap (2015). The Conundrum of Unconstitutional Constitutional Amendments Global Constitutionalism, 4, pp. 114-136. See more for local Georgian context - Godoladze Karlo. Constitutional Reform or Walking Along a Beaten Path Tabula Magazine; available at http://www.tabula.ge/en/story/73713-constitutional-reform-or-walking-along-a-beaten-path (last visited June 26, 2016)

10 Ibid, Po Jen Yap. pp. 116, 132, 136

11 See The Constitution of Georgia. Chapter Five, Judicial Authority - Articles 82-90 Available at https://www.constituteproject.org/constitution/Georgia_2013?lang=en (last visited June 26, 2016)

12 See Godoladze Karlo (2013). Constitutional Changes in Georgia: Political and Legal Aspects Humanities and Social Sciences Review, 2 (3) pp. 443-460. Available at http://universitypublications.net/hssr/0203/pdf/P3G106.pdf (last visited June 26, 2016)

The presiding officer of the supreme legislative body of Georgia conveyed similar concerns. Additionally, Parliament's presiding officer and one of the leaders of Georgia's incumbent governing political coalition emphasized the productiveness of the staff and the members of the constitutional commission, particularly constitutional law experts and political scientists. As he argued, the State Commission for Constitutional Reform was unable to elaborate the draft law of the Constitution for these reasons, but it nonetheless drafted 97-98 concrete proposals covering virtually every key constitutional issue. It is important to note that members of the leading parliamentary majority employed the same justifications. In political science terms, it was the *lingua franca* of both the ruling political elite and leadership.

The fourth and final activity of the Plenary Session of the State Commission for Constitutional Reform took place on February 28, 2016. The commission included 58 representatives from academia, civil society organizations (CSOs and NGOs), and political parties and core state institutions. However, only 21 members took part in the concluding plenary meeting of the commission. The speaker of Parliament outlined why the constitutional commission should conclude its work.

As the chief legislator argued, the State Commission for Constitutional Reform was a victim of the uncooperative political environment created following the Georgian parliamentary elections on October 1, 2012. The political divisions between the opposition and leading coalition completely damaged the entire telos and procedural side of the reform initiative. The speaker of parliament emphasized the same argument at the third plenary meeting of the commission. On March 28, 2015, he put it succinctly: 'we did not want and did not implement fast changes; we did not want and did not implement domination of issues initiated by the Government. To the contrary, the task was to allow everyone express their own positions, offer their own views on the constitutional institutions, norms or mechanisms to be implemented. This is the principle of our activity.'[13]

It seems clear that firstly, the chairperson of Georgia's legislative body conceptualized and focused primarily substantive issues or accented the 'fundamentals of the political constitutionalism'[14] and his conclusive argument was pure procedural by its connotation. He specified that the quorum that is necessary to revise the constitution is one of the highest thresholds and formidable

[13] See The Third Enlarged Sitting of the Constitutional Commission of Georgia. Official web page of the Parliament of Georgia http://www.parliament.ge/en/media/axali-ambebi/the-third-enlarged-sitting-of-the-constitutional-commission.page (last visited June 26, 2016).

[14] See Richard Bellamy, "The Fundamental Constitutional Narratives Respecting Dichotomy between Legal and Political Schools of Thought of Contemporary Constitutionalism," in *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007). Available at http://www.cambridge.org/us/academic/subjects/politics-international-relations/political-theory/political-constitutionalism-republican-defence-constitutionality-democracy#bookPeople (last visited June 26, 2016).

obstacles existed in the contemporary constitutional texts worldwide. According to article 102, paragraph 3 of the Georgian Constitution, a draft law revising the constitution shall be deemed adopted if it is supported by not less than three-fourths of the total number of MPs of Georgia at two successive sessions of the Parliament of Georgia after an interval of at least three months.[15]

Based on this line of reasoning and justification this contribution attempts to understand Georgia's particular politico-legal road map in the prism of modern constitution building, particularly through its context and procedures.[16] In order to become aware of the failures and gaps of recent constitutional reform efforts and assess the future of Georgian constitution-making.[17]

CONTEXTUAL LANDSCAPE AND THEORETIC-DOCTRINAL DIMENSION

"October 1, 2012, was the real turning point in the current history of Georgian polity and statehood, the parliamentary elections saw a change of power through the fundamental instrument of democracy for the first time in the history of Georgian republicanism," I previously argued.[18] 'It was not only local Georgian success but it also had regional dimension by the side of practical implementation of the rule of law paradigm and genuine constitutionalism in South Caucasus region.'[19]

Right after the peaceful electoral transition, the newly elected majority coalition of six political parties initiated a new political discourse regarding the necessity of the constitutional amendments. The main justification was connected to the dysfunctional construction of legislative-execu-

15 See Constitution of Georgia. Article 102, paragraph 3 Electronically available at https://www.constituteproject.org/constitution/Georgia_2013?lang=ento (last visited June 26, 2016).

16 See the equivalent spirit and perception. Constitution Building: A Global Review (2013) Edited by Sumit Bysaria. International IDEA Resources on constitution building, International Institute for Democracy and Electoral Assistance 2014, Foreword by Nicholas Hysom pg. v. available at http://www.idea.int/publications/constitution-building-a-global-review/loader.cfm?csModule=security/getfile&pageid=65189 See more respecting Constitution Building as the part of Global Politico-legal agenda, discourse and 'common occurrence', by Yves Leterme Secretary-General of International IDEA. Ibid., pp vi-vii (last visited June 26, 2016).

17 See Godoladze Karlo (2015). Absence of Constitution Building: Lessons learned from 20 years of Constitution making in Georgia. Accepted Conference Paper for the Regional Conference - Constitutional Challenges and Constitution-Making, Hosted by the Center for Constitutional Studies at Ilia State University, School of Law Available at Researchgate https://www.researchgate.net/publication/278071615_Absence_of_Constitution_Building_Lessons_Learned_From_20_Years_of_Constitution-making_in_Georgia (last visited June 26, 2016).

18 See Godoladze Karlo (2013). Georgian Electoral Dilemma; Tabula Magazine Available at http://www.tabula.ge/en/story/74511-the-georgian-electoral-dilemma (last visited June 26, 2016).

19 See Godoladze Karlo (2015). Constitutional Theocracy in Context: The Paradigm of Georgia Supra note 6; pg. 202.

tive constitutional arrangements and excessive powers of the head of state, the President of Georgia.[20] It is noteworthy to indicate that from 2012 to 2013, the Georgian body politic included turbulent relations between the Head of State and the Head of Government (the Prime Minister).[21]

At the end of January 2013, the President of the Council of Europe's advisory body regarding constitutional matters, the Venice Commission, visited Georgia and met the highest authorities of the country. According to the official release, 'while the President understood the need for the new majority to deliver results to the voters, he warned against the danger of hasty reforms and recalled the need for broad consensus, notably as concerns constitutional amendments. An in-depth constitutional reform was necessary in order to introduce the necessary check and balances on presidential powers. Such constitutional reform would need to be carried out after a thorough reflection and with due consultation of all the political forces and the civil society. Only in this way would it be possible to achieve the ultimate aim of the process, which was a constitution which unites the Georgian people, not one that divides it.'[22]

The President of the Venice Commission emphasized welcomed the Georgian Parliament decision to appoint a liaison officer to promote effective cooperation with the Commission. Simultaneously, he noted: 'I understand that for the sake of stability of the government and the Parliament after the last parliamentary elections it is necessary to change the constitution, in order to limit powers of the head of state [the President] to dismiss the government and appoint a new government without the authorization of the Parliament.'[23] Indeed, the primary product of the aforementioned deliberations was clear and visible. As the speaker of parliament delineated, Georgia would definitely implement and acknowledge the key recommendations of the Venice Commission.[24]

---

20 See Georgia needs new constitution. The Messenger Online – Georgia's Leading English-language daily Newspaper. Available at http://www.messenger.com.ge/issues/2713_october_12_2012/2713_edit.html (last visited June 26, 2016).

21 See Nakashidze Malkhaz. The Changing Face of Semi-presidentialism in Georgia (2014) Available at http://presidential-power.com/?p=2385 (last visited June 26, 2016) See more about the Phenomenon of the Divided Government, Divided Government in Comparative Perspective edited by Robert Elgie, First published by Oxford University Press 2001.

22 See Venice Commission and Georgia agree to co-operate on Constitutional Revision and Legislative Reforms. Available at http://www.venice.coe.int/webforms/events/?id=1655 For Democracy through Law – The Venice Commission of the Council of Europe (last visited June 26, 2016).

23 See Venice Commission President Sums Up Georgia Visit. Civil.ge – Daily News Online Available at http://www.civil.ge/eng/article.php?id=25701 (last visited June 26, 2016)

24 See Georgia to listen more COE Advice when changing Laws. Democracy & Freedom Watch – Reporting on the State of Georgian Democracy. Available at http://dfwatch.net/georgia-to-listen-more-to-coe-advice-when-changing-laws-32895-17371 (last visited June 26, 2016).

Right after the clear messages by the Council of Europe and particularly the Venice Commission, the struggle regarding constitutional amendments entered into a new intensive phase. In February-March 2013, there were extensive negotiations and deliberations, political bargaining, and challenging discussions between two divided political camps of Georgian political elite, the governing coalition (GD - Georgian Dream) and United National Movement (UNM) opposition. At the very beginning the process faltered, but in time the political actors reached a last minute consensus regarding the content of new constitutional provisions that curtailed the presidential discretionary power to dismiss the executive government.[25]

In pure constitutional terms, according to renowned Irish scholar Robert Elgie, 'President-parliamentarism is a form of semi-presidentialism where the prime minister and cabinet are collectively responsible to both the legislature and the president'.[26] As he indicated, Georgian constitutional system functioned as President-parliamentarism from 2004 until the parliamentary election of 2012.

As Elgie put it: 'following 2004 constitutional amendments and explicitly article 73(1 c) of the Constitution of Georgia states that the president is "entitled, on his/her own initiative or in other cases envisaged by the Constitution, to dissolve the Government..." Additionally, article 78 (1) definitely states that "The Government shall be responsible to the President and the Parliament of Georgia." In this doctrinal insight, the distinguished academic concluded that 'this is a very clear statement of President-parliamentarism.'[27]

This President-parliamentarism form of semi-presidentialism ended after the first-ever peaceful electoral transfer of power in Georgia. Thus, the aforementioned amendments and consensual agreement between political forces of Georgia clearly contributed to a new modality or subtype: Premier-presidentialism (Elgie) Georgian constitutionalism. According to the Irish scholar, Premier-presidentialism is based on the premise that 'the prime minister and cabinet are collectively responsible solely to the legislature.'[28]

---

25 See Georgian tug of war on Constitution ends Compromise. Democracy & Freedom Watch – Reporting on the State of Georgian Democracy. Available at http://dfwatch.net/georgian-tug-of-war-on-constitution-ends-in-compromise-38634-18886 (last visited June 26, 2016).

26 See Elgie Robert. Semi-Presidentialism Sub-Types and Democratic Performance, Oxford Comparative Politics, OUP – Oxford University Press 2011; pg. 28.

27 Ibid., pp. 28-29.

28 See supra note 26; pg. 28.

The essential feature of a parliamentary régime in classical (Westminster) or rationalized (constrained) parliamentary systems is the accountability of the executive government.[29] In this paradigmatic prism, the proposed subtype is more parliamentary by its definitional spirits and origins.[30]

In the Georgian constitutional context, this theoretical puzzle within the constitutional narrative is actualized alongside the Venice Commission. In its Opinion on three draft Constitutional laws amending two constitutional laws amending the Constitution of Georgia, the commission's experts and rapporteurs specified that 'the 2010 constitutional reform made the Georgian system evolve from a semi-presidential system towards a more parliamentarian one.'[31]

This author reasonably believes that despite those definitional conundrums and deficiencies, the current constitutional framework of Georgia, which relies 'solely on the wording of the Constitution,'[32] doctrinally fits the prism of Premier-presidentialism.

The implementation of Constitutional Law of Georgia No 496 of 25 March 2013 changed and explicitly defined the cases in which the Head of State has the competence (Article 51[1]) to dis-

[29] See Respecting Monism and Dualism in pure Parliamentary regimes – Lauvaux Philippe, Le parlementarisme, Paris, P.U.F. 1997 Delegation and Accountability in Parliamentary Democracies, Edited by Kaare Strøm, Wolfgang C. Müller and Torbjörn Bergman, Chapter 1, Parliamentary Democracy: Promise and Problems pp. 3-33, Oxford University Press 2003. See also regarding definitional conundrum – José Antonio Cheibub, Zachary Elkins and Tom Ginsburg (2014). Beyond Presidentialism and Parliamentarism British Journal of Political Science, 44, pp. 515-544. The Oxford Handbook of Comparative Constitutional Law edited by Michel Rosenfeld and András Sajó. Part IV Architecture Chapter 30 – Parliamentarism, Anthony W. Bradley and Cesare Pinelli, Oxford and Rome, pp. 650-671 OUP – Oxford University Press 2012. Semi-Presidentialism and Democracy, edited by Robert Elgie, Sophia Moestrup and Yu-Shan Wu, Chapter 6 – Semi-Presidentialism under Post-Communism by Oleh Protsyk First published 2011 by Palgrave Macmillan.

[30] See more respecting definitional and practical dimensions of the above-mentioned controversial issues in pure European context. Jan Herman Reestman (2006). Presidential Elements in Government, Introduction, European Constitutional Law Review, 2; pp. 54-59 Miroslaw Wyrzykowski and Agnieszka Cielen (2006). Presidential Elements in Government Poland - Semi-presidentialism or 'Rationalised Parliamentarianism'? European Constitutional Law Review, 2, pp. 253-267 Vlad Constantinesco and Stéphane Pierré-Caps (2006). Presidential Elements in Government France: The Quest for Political Responsibility of the President in the Fifth Republic European Constitutional Law Review, 2, pp. 341-357 See also Semi-Presidentialism in Europe, edited by Robert Elgie. First published by Oxford University Press 1999.

[31] See Opinion on Three Draft Constitutional Laws amending two Constitutional Laws amending the Constitution of Georgia. Adopted by the Venice Commission at its 96thPlenary Session (Venice, 11-12 October 2013) on the basis of comments by Mr. Jean-Claude Scholsem (Substitute Member, Belgium) and Mr. Evgeni Tanchev (Member, Bulgaria) available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)029-e (last visited June 26, 2016).

[32] See the Paradigmatic case respecting Bulgarian Constitution. According to Elgie 'Bulgaria is unequivocally Semi-presidential (Premier-presidentialism)', the same constitutional logic is authentic in the genuine Georgian context. Supra note 26, pp. 22-25.

solve the national legislative assembly of Georgia. At the same time, the law revised Article 73 of the Georgian Constitution which regulated the competencies and powers of the President.[33]

Before the final confirmation of the constitutional amendments and just after their unanimous adoption following first reading, Georgia's influential western partner and strategic ally, the United States, delivered an official statement via its Embassy in Tbilisi lauding 'the important step' that 'displayed statesmanship on all sides and paves the way for consolidation of Georgian democracy.'[34]

Following this endorsement of the constitutional amendments, the High Representative of the European Union for Foreign Affairs and the Commissioner for Enlargement and European Neighbourhood Policy released a joint statement highlighting 'the cross-party consensus that underpins this agreement demonstrates the commitment of all sides in Georgian politics to good governance in the national interest. The constitutional amendment, which confirms the role of the democratically-elected parliament in approving the appointment of a new government, consolidates Georgia's democracy and sets an important precedent for co-operation between all parties in Georgian politics.' As well, the High Representative and European Commissioner called all Georgian stakeholders to continue their joint work in this 'constructive spirit' for the best interest of the Georgian people.[35]

As regarding sociological dimension of the aforementioned amendment,[36] a survey carried out for NDI National Democratic Institute by CRRC Caucasus Resource Research Centers strongly confirmed that majority of respondents (54 percent) supported reducing Presidential powers to dissolve the government without parliamentary authorization (POS question 24).[37] Indeed, in this context, the mindsets of the people – *vox populi* – and of the basic political stakeholders went hand in hand and

33 See Constitutional Law of Georgia No 496 of 25 March 2013 – website, 27.3.2013 The Legislative Herald of Georgia. Available at https://matsne.gov.ge/en/document/view/30346 (last visited June 26, 2016).

34 See U.S. Embassy Statement on Constitutional Agreement (March 21, 2013). Available at http://georgia.usembassy.gov/latest-news/statements2013/constitution.html See also Parliament passes the first reading of draft Constitutional Amendment Tabula Magazine. Available at http://www.tabula.ge/en/story/70808-parliament-passes-the-first-reading-of-draft-constitutional-amendment (last visited June 26, 2016).

35 See Joint Statement by the spokespersons of High Representatives Catherine Ashton and Commissioner Štefan Füle on the unanimous adoption of an amendment to Georgia's Constitution, Available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/136579.pdf (last visited June 26, 2016).

36 See Chris Tornhill. A Sociology of Constitutions, Constitutions and State Legitimacy in Historical-Sociological Perspective, Cambridge University Press 2011.

37 See Public Attitudes in Georgia: Results of a March 2013 Survey carried out for NDI by CRRC. Funded by the Swedish International Development Cooperation Agency (SIDA) Available at http://www.civil.ge/files/files/2013/NDI-Poll-March-2013.pdf (last visited June 26, 2016).

gave socio-politico-legal legitimacy to the implemented constitutional amendments. In proper constitutional terms, this demonstrated the so-called 'consociational' or power-sharing constitutionalism.

Subsequently, the first consensual collaboration between the leading oppositional bloc and ruling majority Georgia's occurred and the constitutional odyssey entered into a new phase. The governing majority continued its established discourse narratives and at this time justified modifications to the robust prime ministerial power. Despite the hostile political landscape, political proponents finally attained a verbal compromise respecting the establishment of the third State Commission for Constitutional Reform on the eve of July 2013. As the leader of the parliamentary minority and former speaker of Parliament of Georgia explained 'the Commission will have [include] the members of the United National Movement, other political actors, NGO's and expert community... Unquestionably, its primary intention and aim will be to prepare a model of the Constitution which is optimal for the next 10-15 years for Georgia in [a] peaceful, calm process through consensus.'[38]

It is essential to emphasize that 'the language of inclusion' and the genuine constitutional 'consensus-building mechanisms and toolkits' were scarce after the 'sacral electoral transition' in Georgia. To the author's best knowledge, there were three paradigmatic cases related to the reconciliation of the main Georgian political stakeholders. The first case was thoroughly scrutinized above and was linked to the so-called 'Grand Agreement or Compromise' in relation to the curtailment of the presidential power, formally implemented by the unanimous endorsement of the parliamentary majority and minority on March 25, 2013. The second case emerged following the completion of negotiations between the leadership of the governing political coalition and minority opposition in Parliament on July 7, 2013 to initiate the third State Commission for Constitutional Reform, which included a wide spectrum of societal groups.[39] The final case is tied to the last constitutional amendment (October 4, 2013) to the supreme social contract (the constitution) of Georgia.[40] On the same day, the Parliament of Georgia issued the decree 'On the Establishment of the State Constitutional Commission'.[41]

---

38 See Government to form Constitutional Commission and stop court cases. Democracy & Freedom Watch – Reporting on the State of Georgian Democracy. Available at http://dfwatch.net/government-to-form-constitutional-commission-and-stop-court-cases-25288-21124 (last visited June 26, 2016).

39 See Inter-party discussion of Constitutional Amendments in Ureki. The Messenger Online, available at http://www.messenger.com.ge/issues/2898_july_8_2013/2898_ani.html (last visited June 26, 2016) See also Gunther Teubner, Constitutional Fragments: Societal Constitutionalism and Globalization, Translated by Gareth Norbury, First published by Oxford University Press 2012.

40 According to the Legislative Herald of Georgia, there are 33 amendments to the Georgian Constitution. See last one. Constitution of Georgia, Constitutional Law of Georgia – 1456 -Is- Website, 16/10/2013. Available At https://matsne.gov.ge/en/document/view/30346 (last visited June 26, 2016).

41 See supra note 2. The formal legal backgrounds for the third State Commission for Constitutional Reform, See also New Constitutional Commission to be established, available at http://www.messenger.com.ge/issues/2962_october_7_2013/2962_edit.html Georgian State Commission works on Constitutional Reform, The Messenger Online – Georgia's Leading English-language daily Newspaper, Available at http://www.messenger.com.ge/issues/3066_march_5_2014/3066_tatia.html (last visited June 26, 2016).

Constitutionally, the summer time of 2013 was very contentious. At this time, the incumbent leading coalition initiated another set of constitutional amendments and there were intensive public deliberations and consultations respecting the merits and weakness of the constitutional proposals. On the last day of July, Georgian authorities asked the Venice Commission to state its position regarding the validity of the constitutional reforms.[42] The commission briefly summarized key points from its comprehensive analysis of Georgia's constitutional reform package from 2010. The Venice Commission repeated its concerns regarding the budgetary autonomy of Parliament and the ambiguity of the proposed constitutional clauses. Simultaneously, the rapporteurs encouraged the Georgian authorities to seek 'an appropriate balance' between constitutional flexibility and rigidity in order to find the pertinent formula for the constitutional revision.[43]

The entire constitutional landscape was thoroughly characterized by deep-seated cleavages between the central political players of Georgia. There was no incentive for political actors, especially the political minority or the leading oppositional bloc to extensively engage in the constitutional reform process; as shall see, this scrupulously destroyed both procedural and substantial dynamic of the State Commission for Constitutional Reform. As the respected authors of the Trends in Constitution Building 2013 solidly articulated 'experiences demonstrated that for participatory and representative constitution making to succeed, it is essential to have the buy-in of the powerful elites.'[44]

Simultaneously, the coalitional majority was lacking a discourse of inclusivity; in other words, they did not manage to find common ground for comprehensive constitutional reform. Based on the outset, it was not surprising that the third State Commission for Constitutional Reform failed to define an inclusive forum for reasonable deliberation, continuing the 'Georgian Pattern' in the field of constitution making. Thus the process was missing representatives from minority groups, women (or a gender-inclusive approach)[45] or youth.[46]

---

42 See supra note 31. pp. 2-8.

43 See the Precise Approach by the Venice Commission respecting constitutional amendments. Report on Constitutional Amendment. Adopted by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009) Available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)001-e (last visited June 26, 2016).

44 See supra note 16. Constitution Building: A Global Review (2013) Edited by Sumit Bysaria. International IDEA Resources on constitution building, International Institute for Democracy and Electoral Assistance 2014 Electronically available at http://www.idea.int/publications/constitution-building-a-global-review/loader.cfm?csModule=security/getfile&pageid=65189 (last visited June 26, 2016).

45 See more as regards to the notion of Feminist Constitutionalism in the modern Global Discourse. Feminist Constitutionalism Global Perspectives Edited by Beverly Baines, Daphne Barak-Erez and Tsvi Kahana, Foreword by Catharine A. Mackinnon See also supra note 40. Chapter 3: Women and constitution building in 2013 by Melanie Allen pp. 16-25.

46 See Giorgi Meladze & Karlo Godoladze, Constitution for "All" or for "Chosen Few" – Problems of Constitution-making in Georgia, Constitutional Law Review (CLR) July 2015 N8 pp. 23-30 Published by the Constitutional Court of Georgia in partnership with Ilia State University. Available at http://www.constcourt.ge/en/publications/journals/constitutional-law-review-viii.page (last visited June 26, 2016).

THE THIRD STATE COMMISSION FOR CONSTITUTIONAL REFORM AND ITS CONTROVERSIAL 'LEGACY'

As mentioned, the composition of the third State Constitutional Commission organically preserved and firmly maintained the arrangements of the past practice.[47] The aforementioned quasi-constituent assembly was comprised of political parties and institutional leadership from state bodies. It covered legislative, executive, judicial and so-called fourth branch institutions (such as *inter alia* the Ombudsman or Public Defender of Georgia). The assembly represented some voices from civil society, but their overall impact on decision-making was modest.

It is important to note that since the creation of the first State Commission for Constitutional Reform there have been no clear-cut criteria for the selection of representatives and the total number of members.[48] Consequently, the aforementioned process was strongly characterized by governmental voluntarism or the Government's discretion.

The starting point was the selection of the commission members occurred behind closed doors. It was only at the end of the year, particularly December 27, 2013 that the Georgian legislative assembly shed light on the process and formally endorsed two legal documents. The first decree determined the statutory framework or blueprint and second one discussed how to determine the institution's composition.[49] Thus in terms of procedural clarity, 'questions of who participates' and 'how they participate'[50] were decided without any cross-community involvement or dialogue. Overall, it was noticeable that the 'founders' or 'framers' of the institutional settings and arrangements essentially bypassed both the integrative, consultative approaches of modern constitution building and the other contemporary trends in constitutionalism.[51]

---

47 Ibid., pp. 28-29.

48 For comparison, there were almost identical total numbers of representatives in the Second and Third State Commissions for Constitutional Reform, respectively 56 and 58. By way of contrast, there were 118 members in the first State Commission for Constitutional Reform. If we correlate it to the compositional portrayal of other post-soviet countries, particularly Ukraine and keep in mind the diversity of its societal configuration and territory, only 55 members were presented in the Ukrainian institutional counterpart. See Democracy Reporting International. Constitutional Reforms in Ukraine: An update on recent developments and debates Briefing Paper 56, June 2015 Available at http://democracy-reporting.org/files/update_on_constitution_making_en.pdf (last visited June 26, 2016).

49 See Legal Bases of the Constitutional Commission. Decree of the Parliament of Georgia "On the Approval of Statute of the State Constitutional Commission"; Decree of the Parliament of Georgia "On the Approval of the Composition of the State Constitutional Commission"; December 27, 2013. Available at http://constcommission.ge/en/about (last visited June 26, 2016).

50 See supra note 16. Foreword by Nicholas Hysom, pg. v.

51 See James Tully, Jeffrey L. Dunoff, Anthony F. Lang, Jr., Mattias Kumm and Antje Wiener (2016) Introducing Global Integral Constitutionalism, Global Constitutionalism, 5, pp. 1-15. See more Constitution Building: A Global Review (2013) Edited by Sumit Bysaria. Supra note 44, Chapter 2, National Dialogues in 2013, pp. 11-16.

As we emphasized at the beginning of this paper, the labour in the Constitutional Commission was coordinated into five working groups, thus, the primary aim and task of those units was to formulate the basic constitutional narratives, and present it via the Editorial Council of the institution to the Plenary Session of the State Commission for Constitutional Reform for the final approval. The Speaker of Parliament headed the Editorial Council and its membership covered the chairpersons of five working groups and the Secretary of the commission.[52] In practice, the commission's staff members already attended the Editorial Council meetings.[53] The Editorial Council was responsible for conducting thorough deliberations with members and representatives of the Working Groups and the ultimate wording of the Draft Constitutional Law.

The commission membership was oriented towards *pro bono* participation; no one received salaries or honorariums for the job he or she fulfilled. Nevertheless, with this clarification in mind, critics connected the salaries of commission staff members to the absence of a final product, a draft version of constitutional law.[54] Membership attendance was another key problem that arose during the commission's activities and severely damaged public confidence and trust in the institution. Based on comparative constitutional studies, such problems are particularly visible in so-called fragile, immature or transitional democracies where authoritarian pathologies and institutional nihilism are familiar patterns of social behavior.[55]

In purely statistical terms, according to official recordings of attendance in all five working groups and Plenary Sessions of the Commission, there were multiple cases when the necessary quorum was not met. In order to understand why, it was worth noting that there were the total absence of quorum in the following working groups: on the Issues of the Parliament, the President, and the

[52] There were nine staff members in the Third Sate Commission for Constitutional Reform. Each Working Group was served by one Legal Adviser who was responsible for the formal articulation of the group workings, and the analysis of the recent developments in the comparative constitutional law in order to equip the members with newest approaches and studies, other staff members were responsible for the technical functioning or logistics, public (PR) or international relations (IR) and the running of the web page of the Constitutional Commission.

[53] See The working meeting of David Usupashvili with the Editorial Group of the Constitutional Commission. available at http://www.parliament.ge/en/media/axali-ambebi/the-working-meeting-of-david-usupashvili-with-the-editorial-group-of-the-constitutional-commission.page (last visited June 26, 2016).

[54] See President's Advisor criticizes State Constitutional Commission. The Messenger Online – Georgia's leading English-language daily Newspaper. Available at http://www.messenger.com.ge/issues/3575_march_1_2016/3575_edit.html (last visited June 26, 2016).

[55] See The Politics of Transition in Central Asia and the Caucasus. Enduring Legacies and Emerging Challenges. Edited by Amanda E. Wooden and Christoph H. Stefes Chapter 4, State Power and Autocratic Stability, Armenia and Georgia compared, by Lucan Way, pp. 103-124; first published 2009 by Routledge. See also Constitutionalism & Democracy. Transitions in the Contemporary World, The American Councils of Learned Societies, Comparative Constitutionalism papers, Edited by Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero and Steven C. Wheatley; Oxford University Press 1993.

Government of Georgia, on the Issues of Independent Constitutional Institutions and on the Issues of Territorial Arrangement and Local Self-Government. On one occasion, the quorum was met in the Working Group on the Issues of Human Rights and Freedoms, the Judiciary and Prosecuting Institutions. As respecting Working Group on the Issues of General Provisions and Revision of the Constitution of Georgia, it was the only unit which managed and reached the quorum three times.[56]

In terms of substance, it was clear that specific viewpoints and perceptions about the conceptual contours of the ongoing constitutional reform were scarce amongst the members of the commission. Furthermore, the notional clarification was the Achilles heel of the commission's activity and unquestionably perpetuated the very 'conventional pattern' of Georgian constitution making. According to 'conventional wisdom' entrenched from the very beginning of the first State Commission for Constitutional Reform, the idea is to formulate governmental narratives as the basis for the future constitutional deliberations.[57]

During the formal meetings of the commission, many members focused on understanding and clarifying the position of the governmental authorities, which would then help shape their own decisions, performance, and behavior; this is keeping with trends in other developing, fragile democracies. What's more, such a pattern is an indisputable *Modus Vivendi* of the complete constitution-making operation in Georgia.

---

[56] The particular statistics of the group workings were the following: Working Group on the Issues of General Provisions and Revision of the Constitution of Georgia –12 official meetings (twice failed); Working Group on the Issues of the Parliament, the President, and the Government of Georgia – 5 meetings; Working Group on the Issues of Human Rights and Freedoms, the Judiciary and Prosecuting Institutions –12 meetings; Working Group on the Issues of Independent Constitutional Institutions – 8 meetings; Working Group on the Issues of Territorial Arrangement and Local Self-Government –10 meetings, Plenary Session of the Constitutional Commission was held four times, The attendance quorum was reached in the first and second meetings, See short Overview of the aforementioned plenary sessions at http://constcommission.ge/en-23 (March 3, 2014) and http://constcommission.ge/en-24 (March 29, 2014) See also Constitutional Commission gets to work, The Messenger Online – Georgia's leading English-language daily Newspaper. Available at http://www.messenger.com.ge/issues/3067_march_6_2014/3067_edit.html (last visited June 26, 2016).

[57] See Wolfgang Babeck. Drafting and Adoption of the Constitution of Georgia; IRIS Georgia; Tbilisi 2002, In particular, the phenomenon of the second President of Georgia and his personal impact on the whole constitution-making operation during 1993 -1995. The conventional pattern of 'governmental narratives' unchallengeable preserved in the Second State Commission for Constitutional Reform (2009-2010). It was one of the primary reasons why non-parliamentary political forces boycotted the process and questioned the legitimacy of the institution See also Wolfgang Babeck, Steven Fish, and Zeno Reichenbecher. Rewriting a Constitution: Georgia's shift towards Europe With an introduction by Avtandil Demetrashvili, Chairman of the State Constitutional Commission; Nomos Publishing; Baden-Baden; 2012.

Before we arrived at the discoursive components of the commission's disputes and scrutinize the outcomes of the working groups, it seems desirable to understand the peculiarities of international involvement in the operating phases of constitution making. As some contemporary authors argue, modern constitution making is not merely sovereign; instead, it has amalgamated post-sovereign dimensions.[58] This paper briefly sketched the participatory pattern of the internal Georgian civil actors and stakeholders in order to grasp well both internal and external dynamics of the constitutional reform.[59]

From the early beginnings of the commission's workings, international actors and stakeholders actively engaged in the process. Council of Europe via its office in Georgia as well as Venice Commission for democracy through law vigorously assisted and empowered State Commission for Constitutional Reform both technically and substantially. Deutsche Gesellschaft für Internationale Zusammenarbeit or German Technical Cooperation (hereafter GIZ) also collaborated with State Constitutional Commission and ensured the creation numerous of reports and research papers respecting controversial and constitutional issues.[60] At the same time, GIZ was actively involved in the promotion of education and awareness regarding ongoing constitutional reform and organized a special workshop for leading media outlets operating in Georgia.[61]

The Parliamentary Assembly of the Council of Europe (PACE) scrutinized the political developments in Georgia and released its resolutions, which covered *inter alia* constitutional reform.[62]

---

58 See Andrew Arato. Post Sovereign Constitution Making Learning and Legitimacy. Oxford Constitutional Theory, OUP 2016 See also Annual Review of Constitution Building Processes: 2014. International IDEA resources on constitution building processes, International Institute for Democracy and Electoral Assistance 2015 Available at http://www.idea.int/publications/annual-review-of-cbp-2014/index.cfm?css=new2013 (last visited June 26, 2016).

59 The author of this paper argued that such a peculiar synthesis of sovereign and post-sovereign constitution building may be defined under an umbrella term - 'glocal constitution building'.

60 See Dr. Matthias Mähring. Public Financial Management in the South Caucasus, The Budgetary Powers of Parliaments a Comparative Analysis with particular reference to the Georgian context, GIZ Advisory Services Bonn, 14 July 2015; Parliamentary and External Financial Oversight, Analysis of the Constitutional and legislative framework, Bonn, 1 November 2014; Prof. Dr. Peter Häberle Legal Opinion for the State Commission for Constitutional Reform with regards reform on fundamental, basic rights See also The meeting with the working group of the State Constitutional Commission on Budgetary Authority of the Parliaments Available at http://parliament.ge/en/saparlamento-saqmianoba/komitetebi/iuridiul-sakitxta-komiteti-146/axali-ambebi-iuridiuli/parlamentebis-sabiudjeto-uflebamosilebis-sakitxebtan-dakavshirebit-saxelmwifo-sakonstitucio-komisiis-samushao-djguftan-shexvedra-gaimarta.page (last visited June 26, 2016)

61 See Within the Framework of the Joint Project of EMC, GIZ and the State Commission for Constitutional Reform the Seminar was held for journalists on December 19-21, 2014 available at http://constcommission.ge/news-19-21/12 (last visited June 26, 2016).

62 See the Functioning of Democratic Institutions in Georgia. Assembly debate on 1 October 2014 (32nd and 33rd Sittings) available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21275&lang=en# See also official web page of the State Commission for Constitutional Reform http://constcommission.ge/en-27 (last visited June 26, 2016).

Furthermore, the representatives and rapporteurs of the Parliamentary Assembly visited Georgia and negotiated with the members of the Constitutional Commission.[63]

On January 16-17 2014, Venice Commission envoys including the President and the Secretary visited Georgia and had high-ranking meetings with the basic Georgian stakeholders, *inter alia* with the Speaker of Parliament. One of the topics discussed within the framework of the delegation was the practical challenge of constitutional reform and possibilities for future assistance and cooperation from the Venice Commission. Finally, the Speaker of the Georgian Parliament and the President of the Commission summarized the meetings for the specially organized press conference.[64] The head of the Venice Commission forcefully called on all Georgian stakeholders to ensure and promote the 'inclusive spirit of cooperation' to ensure the constitutional reform's success.[65]

On May 22, 2014 the Venice Commission, including members from Croatia, Malta, Romania and Switzerland, as well as the head of the delegation, the Secretary of the commission, held working sessions with members from all five working groups of the Georgian constitutional commission and deliberated a myriad of overarching constitutional issues. As the Secretary of the Venice Commission, Mr. Thomas Markert put it accurately: 'the Venice Commission is pleased to contribute the constitutional reform in Georgia. We assess the process positively. It based on an intention to reach consensus. Several sets of constitutional amendments adopted in the past. Georgia needs more stability. From my point of view, we are standing in the right way in the context of finding the outcome that is mutually agreeable to every major political force.[66]

The Venice Commission's 98th, 99th and 100th Plenary Sessions in 2014 were oriented towards informational exchanges and updates regarding constitutional reform in Georgia. Representatives

63 See PACE monitor calls for further reforms in Georgia. Available at http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5348&lang=2&cat See also
Editorial Council of the State Commission for Constitutional Reform held the meeting with the delegation of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE) on December 4, 2014, Available at http://constcommission.ge/news-04/12 (last visited June 26, 2016).

64 See the video mainstream of the joint Press Conference of the Speaker of Parliament and the President of the Venice Commission. Available at https://www.youtube.com/watch?v=GF_e13q0uhM (last visited June 26, 2016).

65 See Venice Commission says Georgian Constitution should meet Political and Social Requirements. The Messenger Online – Georgia's leading English-language daily Newspaper. Available at http://www.messenger.com.ge/issues/3034_january_20_2014/3034_ani.html (last visited June 26, 2016).

66 See Georgia – Meeting with the Georgian Constitutional Reform Commission. Available at http://www.venice.coe.int/webforms/events/?id=1861 http://constcommission.ge/en-22 The Visit of Venice Commission in Georgia http://www.parliament.ge/en/parlamentarebi/tavmdjdomare-1125/tavmdjdomaris-axali-ambebi/veneciis-komisiis-viziti-saqartveloshi.page (last visited June 26, 2016).

of Georgian authorities systematically presented and tabled the developments before the Plenary Session of the Venice Commission. In its 100th Plenary Session, the Speaker of the Georgian Parliament delivered a comprehensive speech on the progress of the Constitutional reforms.[67]

The same trends of cooperation and collaborative continued in 2015. On May 21-22, 2015 within the framework of the Council of Europe's project "Strengthening the Independence and Efficiency of the Justice System in Georgia" organized a roundtable discussion, "On Independence of the Judiciary, full Individual Access to Constitutional Court and Prosecution Service Constitutional Settings".[68] Subject experts invited by the Council of Europe and representatives of the Venice Commission shared and explored contemporary international and pan-European standards and paradigms with regards to judicial independence and impartiality as the ultimate values in any constitutional democracy.

The second part of the meeting was oriented towards constitutional justice and, in particular, additional constitutional remedies to enhance and foster the protection of fundamental human rights in the light of European approaches and Croatian constitutional jurisprudence and case law. Concurrently, based on reference documents from the Venice Commission, the speakers gave overviews of best practices and European conceptions of prosecution, along with its place classical tripartite constitutional government.[69] Finally, in its 103rd Plenary Session (June 19-20, 2015), the Venice Commission was informed about the progress of constitutional reform in Georgia.[70]

---

67 See 98th Plenary Session of the Venice Commission – http://www.venice.coe.int/webforms/events/?id=1766; 99th Plenary Session of the Commission – http://www.venice.coe.int/webforms/events/?id=1767; 100th Plenary Session of the Commission – http://www.venice.coe.int/webforms/events/?id=1768 (last visited June 26, 2016).

68 See Georgia – Constitutional reform. http://www.venice.coe.int/webforms/events/default.aspx?id=2017 See also European Commission for Democracy through Law (Venice Commission) in co-operation with the State Constitutional Commission of Georgia. Working Group on Human Rights and Fundamental Freedoms, Judiciary and Prosecution Service, Roundtable Discussion on Independence of the Judiciary, Full Individual Access to Constitutional Court and Prosecution Service Constitutional Setting, Report "Full Individual Access to the Constitutional Court as an Effective Remedy for Human Rights Protection" by Ms. Slavica Banić (Justice, Constitutional Court of Croatia, former Substitute Member of the Venice Commission) available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2015)011-e Gudauri, Georgia 21-22 May 2015 (last visited June 26, 2016).

69 See more respecting meeting peculiarities. Available at http://www.parliament.ge/en/media/axali-ambebi/manana-kobakhidze-participated-in-the-working-meeting-of-the-state-constitutional-commission.page (last visited June 26, 2016).

70 See 103rd Plenary Session of the Venice Commission of the Council of Europe. Venice, June 19-20, 2015. All official information available at http://www.venice.coe.int/webforms/events/default.aspx?id=1914 (last visited June 26, 2016).

Georgian civil society was also involved in this process: Georgian think tanks and non-governmental organizations provided extensive input and proposals to the State Commission for Constitutional Reform. Based on their capacities and expertise, the Georgian civil sector initiated a number of concrete conceptual narratives and constitutional clauses with respect human rights, the electoral system, constitutional arrangements of the Prosecutorial Service, institutional changes to the Public Defender office of Georgia, suggestions and recommendations regarding the Judiciary, and a comprehensive concept paper and strategy local-self governmental definitions and arrangements.[71]

To conclude this chapter, we focus on the most challenging constitutional issues and debates in the constitutional commission. In terms of deliberation, the Working Group on the Issues of Human Rights and Freedoms, the Judiciary, and Prosecuting Institutions ensured a dynamic and productive environment. This group maintained a work-friendly environment and background until the end of 2015.

Despite the absence of quorum (achieved once over the course of 12 meetings), there were lively discussions and conceptual debates regarding foundational constitutional issues, in particular, the institutional design or arrangements of judicial authority. During the actual operation of the State Commission for Constitutional Reform, the working group discussed only the peculiar arrangements and institutional refinement of the judiciary, the other two important realms being Prosecution Service settings, Basic Human Rights and Freedoms went unchanged and were excluded from the discourse agenda.[72]

A pivotal issue raised in the working process was judicial appointments, particularly the tenure appointments of justices in the constitutional system. Proponents and opponents spoke at length to emphasize their arguments, recommendations, and constitutional proposals. On December 15, 2014, vigorous deliberations centered on lifetime appointments. Proponents reflected the comparative constitutional studies *inter alia* approach of the Venice Commission and focused on entrenched tenure appointments, while opponents highlighted the peculiar context of Georgian

[71] See the general overview of the International and local organizations involvement in the process of constitution making, comprehensive speech respecting mentioned issues by the side of the Secretary of the State Commission for Constitutional Reform, the third Plenary Meeting of the SCC of Georgia (March 28, 2015) Available at http://www.parliament.ge/en/media/axali-ambebi/the-third-enlarged-sitting-of-the-constitutional-commission.page (last visited June 26, 2016).

[72] The only exception from this pattern was the official roundtable discussion with the Venice Commission in which one of the topics covered by the foreign experts was the arrangements of the Prosecutorial Service in the European constitutional spaces, See supra note 62.

judicial design and arrangements. During the timeframe of the State Commission for Constitutional Reform, the membership of this working unit did not manage to develop a conclusive constitutional formula in connection to the fundamentals of the Judiciary.[73]

By way of contrast, in practical terms, the Working Group on the Issues of the Parliament, the President, and the Government of Georgia was the most unproductive. During the two years, it was the only commission unit that handled only five working meetings. Early meetings of the working group were oriented around clarifying procedural and technical issues; disputes respecting governmental institutional frameworks exclusively took place at third and fourth working conventions of the working group, on May 5 and 12, 2014. Since then, the working unit assembled only once, at the very end of the formal mandate of the State Commission for Constitutional Reform (February 12, 2016).

The key debates regarding the formulation of the constitutional design of the executive and legislative branches as well as the role and the function of the head of the state were held on May 12, 2014. This was the final discourse of this working group, according to the decision of the chairperson of the working unit the session held behind closed doors. The presiding person of the working unit presented the basic project respecting the constitutional design and domains of the executive-legislative arrangements and institutional affiliations. Members of the Working Group discussed the very formation of the executive government, so-called investiture procedure, and the confidence no-confidence modalities in the contemporary constitutional jurisdictions. Throughout the meeting, some prominent academics discussed the peculiarities of the modern forms of governance and explored the substantial nature of the semi-presidential and parliamentary regimes relevant to the Georgian constitutional context.[74]

The Working Group on the Issues of Independent Constitutional Institutions was primarily oriented towards the refinement of the constitutional framework of the Ombudsman's Office of Georgia, Independent Agency institutions *inter alia* State Audit Office of Georgia, National Bank of Georgia, National Security Council of Georgia etc. Some members of the working unit argued about the necessity of formulating a separate constitutional chapter, which covered all independent institutional actors. It is important to note that because of the non-political nature of the issues and

[73] See Working Group on the Issues of Human Rights and Freedoms, the Judiciary and Prosecuting Institutions held a Meeting on December 15, 2014. Available at http://constcommission.ge/news-08/11 (last visited June 26, 2016) .

[74] See the State Commission for Constitutional Reform holds closed meeting, The Messenger Online – Georgia's Leading English language daily Newspaper. Available at http://www.messenger.com.ge/issues/3114_may_13_2014/3114_ani.html (last visited June 26, 2016).

topics deliberated by the group members it was more probable to find final agreement about the formulation of the constitutional clauses. Despite these cooperative environments, the overall functioning and dynamic of the State Commission for Constitutional Reform adversely affected on the productiveness of this working group.

One of the crucial topics discussed in the process of the Working Group on the Issues of General Provisions and Revision of the Constitution of Georgia was the so-called revision clause and the appropriate formula for the Georgian Constitution. This issue was forcefully actualized just after the electoral transition in Georgia and as we indicated earlier, the Georgian political leadership argued against the very excessive rigidity of the revision clause in the Georgian constitutional context. The Georgian non-governmental sector and leading constitutional lawyers group initiated so-called Scandinavian approach (plurality vote mechanism) towards this line also presented and tabled constitutional proposal respecting the 'eternity clauses' formulation in Georgia's supreme social contract. The working group also scrutinized the possibility of the involvement of the Constitutional Court in the revision process, as recommended by the Venice Commission. Concurrently, the working unit disputed the direction of the territorial arrangements and more particularly the status of Georgia's breakaway regions.[75]

The Working Group on the Issues of Territorial Arrangement and Local Self-Government examined the definitional blueprint of the local self-government and its constitutional entrenchment. The members of the working group initiated a couple of constitutional proposals respecting financial and institutional guarantees of Local Self-Governmental entities. In addition, the members of the working group proposed and originated the constitutional clause according to all fundamentals that essentially related the functioning of the local self-government, defined and regulated by the organic laws of Georgian polity. Finally, one of the topics deliberated within the working of the mentioned working unit was expanding the circle of the subjects of the constitutional complaints before the Constitutional Court of Georgia regarding the issues related the local self-government.[76]

Overall, the ultimate product of the State Commission for Constitutional Reform was nearly 100 conceptual proposals, which covered the basic constitutional and institutional issues. The likelihood that those conceptual proposals will be used by the new political elites or leadership seems

[75] One of the members of the working unit initiated to introduce constitutional agreements for the breakaway Regions of Georgia but the majority of the members rejected it.

[76] All constitutional proposals and narratives formulated on Georgian, thus, the very errors and gaps of the translation belong to the author of the present paper.

small, however. This feature led to solid feedback from critics of the State Commission for Constitutional Reform and triggered controversial perceptions respecting the 'legacy' of Georgia's third constitutional reform and its institutional vehicle.

CONSTITUTION AS AN IMAGO POLITICO

'In late antiquity, Blessed Augustine had built his theory of society or polity on the very idea that every person is an *imago dei.*'[77] If we perceive the wisdom of this medieval political theology, which was the foundation or bedrock of the modern grammar and conceptual framework of the contemporary public law and constitutional studies, we must understand constitution-making as the product of politics, or as an *Imago Politico*. Contemporary scholars and practitioners similarly argue that contemporary constitution-building processes are inherently political due to their *nature* and procedural dimensions'.[78]

Georgia's attempt to revise its fundamental social contract suggests the following conclusions: in the absence of the culture of participatory constitutionalism, it is impossible to construe genuine legitimacy for the polity's fundamental law. Secondly, as Jon Elster once eloquently wrote, 'working in the shadow of conflict, low levels of trust, and fundamental disagreements regarding both the constitutional process and design, are not conducive to the cooperation and compromise required for successful constitution-building'.[79] Finally, without the *bona fide* incentivization and engagement of political elites in the constitution making process, the practical implementation of the constitutional changes seems hopeless, unreasonable and implausible.

Future framers or constitution-makers of the Georgia's constitutional fundamentals should reconsider *context-relevant essential virtue*. To paraphrase the renowned American public intellectual

---

77 See Matthias Goldman (2016). A Matter of Perspective: Global Governance and the Distinction Between Public and Private Authority (and not law) Global Constitutionalism, 5, pp. 48-84.

78 See A Practical Guide to Constitution Building Markus Böckenförde, Nora Hedling, and Winluck Wahiu. International Institute for Democracy and Electoral Assistance (International IDEA), 2011 Electronically available at http://www.constitutionnet.org/files/cb-handbook-all-chapters-050112.pdf See also Constitution-making and Reform, Options for the Process, Michele Brandt, Jill Cottrell, Yash Ghai, and Anthony Regan, Interpeace Publisher, 2011 Electronically available at http://www.constitutionmakingforpeace.org/sites/default/files/handbooks/Constitution-Making-Handbook-English.pdf (last visited June 26, 2016).

79 See Interim Constitutions Peacekeeping and Democracy-Building Tools. Lead author Kimana Zulueta-Fülscher, International Institute for Democracy and Electoral Assistance 2015, pp. 5-6 Electronically available at http://www.constitutionnet.org/files/interim-constitutions-peacekeeping-and-democracy-building-tools-pdf.pdf (last visited June 26, 2016).

and theologian Karl Paul Reinhold Niebuhr's famous declaration, 'change what you cannot accept, accept what you cannot change.'[80]

ACKNOWLEDGEMENTS

First and foremost, I would like to thank the staff members and the Secretary of the third State Commission for Constitutional Reform. I consider myself extremely fortunate and honored to have been worked with this brilliant team during two years. For invaluable editorial assistance and comments on earlier versions, I am strongly indebted to a genuine friend of mine Anne Dance, Postdoctoral Research Fellow at the Memorial University of Newfoundland. Finally, special thanks to my longtime friends and colleagues from the Center for Constitutional Studies for their personal and professional support and insights, which always gave me additional spirit and energy in the very process of research.

[80] See Reinhold Niebuhr and Contemporary Politics. God and Power Edited by Richard Harries and Stephen Platten.
Oxford University Press 2010 This passage is the restatement of Niebuhr's famous quotation: "God grant me the serenity to accept the things I cannot change, courage to change the things I can, and the wisdom to know the difference."

EDUARD MARIKASHVILI
Master's student in criminal law Ivane Javakhishvili Tbilisi State University,
Lawyer, Georgian Democracy Initiative.

PROTOCOL NO. 16 TO THE CONVENTION, THE PRINCIPLE OF SUBSIDIARITY AND A NEW AUTHORITY OF THE CONSTITUTIONAL COURT

National justice based on the European standards of the human rights and fundamental freedoms is a principal component of a democratic state and the rule-of-law.

One of the basic aims of the Protocol no. 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is to achieve approximation of national justice of contracting parties to the Convention with the European standards. The Protocol which has not yet entered into force and which is already ratified by Georgia aims at extending advisory jurisdiction of the European Court of Human Rights. Upon entry into force of the Protocol, Supreme Court and Constitutional Court of Georgia will be authorized to request advisory opinions from the European Court of Human Rights concerning the interpretation and application of the human rights and fundamental freedoms in the context of a case pending before them.

In the article below an essence of advisory opinion and the accompanying results will be discussed. Negative expectations followed to the adoption and ratification of the Protocol by Georgia will be analyzed. Advisory jurisdiction as an effective mechanism for the protection of human rights at national level will be discussed. Besides, new power of the Supreme Court and Constitutional Court of Georgia will be analysed, its positive and negative aspects in terms of effective justice, protection of the human rights and independence of courts in the process of delivery of judgments.

INTRODUCTION

On March 4, 2015 Parliament of Georgia ratified Protocol no.16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "European Convention"). This Protocol will enter into force, and consequently the mechanism established under it will became effective upon expiration of a period of three months after the date on which ten Contracting Parties to the Convention have ratified the Protocol.

The Protocol gives authority to the highest courts and tribunals of the Contracting Parties to request the European Court of Human Rights to give advisory opinions. An advisory opinion might be delivered to the requesting court or tribunal in the context of a case pending before it. The request should relate to the interpretation and application of the rights and freedoms defined in the Convention and the protocols thereto.

Elaboration of the Protocol is a part of the reform of the European Court of Human Rights (hereinafter "the ECtHR"). For the first time, the proposal to extend the jurisdiction of the European Court of Human Rights (the Court) to give advisory opinions was made at the Warsaw Summit of the Council of Europe held on May 16-17, 2005. In the report to the Committee of Ministers submitted within the framework of the Action Plan adopted at the summit, the issue of a long-term effectiveness of the ECHR control mechanism was considered. In their opinion, giving authority to the highest courts to request the European Court of Human Rights to give advisory opinions would foster dialogue between the ECtHR and national courts. Apart from this, it would strengthen"constitutional" role of the European Court.

Over the last few years the ECtHR faces an acute problem of a large case load of individual applications. Thus, it is considered that one of the goal of advisory jurisdiction is to reduce the caseload.

Ratification of the Protocol by Georgia caused negative expectations in Georgian reality. To the part of the society effectiveness of advisory jurisdiction as a mechanism is questionable in terms of real protection of rights, fast justice and protection of independence of national court.[1]

Considering the above mentioned, in the first chapter of the present article, the mechanism established by the Protocol no. 16 –jurisdiction of the ECtHR to give advisory opinions will be discussed.

[1] Eva Gotsiridze, Protocol no. 16 to the European Convention on Human Rights – Challenges for Justice, Journal of the Supreme Court of Georgia "Justice and Law", 2015, pg.28.

The second chapter will be devoted to the role of the principle of subsidiarity in the process of implementation of the mechanism. Besides, attention will also be paid to the essence and significance of legal dialogue between the courts. In the third chapter critical opinions/negative expectation followed by the ratification of the protocol will be discussed and positive aspects of advisory jurisdiction will be analysed. In the fourth chapter how the Protocol no. 16 reflected in Georgian legislation will be reviewed and in the conclusion opinions related to the issues discussed in the article will be presented.

PROTOCOL NO. 16 TO THE CONVENTION

Protocol no. 16 to the European Convention was opened for signature on October 2, 2013 in Strasbourg and by today 16 contracting parties have signed, from which 6 of them have already ratified it[2]. The treaty was developed within the framework of the reform of the European Court. It is aimed at improving effectiveness of implementation of the Convention at national level[3] by deepening legal dialogue between the ECtHR and national state authorities in accordance with the principle of subsidiarity.[4]

Protocol no. 16 gives authority to the highest courts and tribunals of the Contracting Parties to request the European Court of Human Rights to give advisory opinions[5]. Advisory opinion might be delivered to the requesting court or tribunal only in the context of a case pending before it[6]. The request should relate only to the interpretation and application of the rights and freedoms defined in the Convention and the protocols thereto.[7]

As noted, according to the Protocol, highest courts and tribunals of the Contracting Parties are considered to be parties to the legal dialogue with the ECtHR. In this case, each of the High Contracting Parties to the Convention decides and at the time of ratification, indicates which high court or tribunal will be authorized to request the ECtHR for advisory opinion.[8] Authors of the Protocol

2 http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures?p_auth=Ja7Y8O61 [last time checked - 8/5/2016]

3 https://wcd.coe.int/ViewDoc.jsp?p=&Ref=DC-PR114%282013%29&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE&direct=true [last time checked – 8/5/2016]

4 Protocol no. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, Preamble.

5 ProtocolN°16, Article 1(1).

6 ProtocolN°16, Article 1(2).

7 ProtocolN°16, Article 1(1).

8 ProtocolN°16, Article 10.

have excluded lower courts from the format of legal dialogue. Limiting the courts eligible to request advisory opinion to the high courts and tribunals is in coherence with the idea of exhaustion of domestic remedies. Only the court(s) decisions of which shell not be subject to revision[9], should be authorised to request the European Court to give an advisory opinion. This limitation also serves avoidance of proliferation of the requests for advisory opinions[10].

The requesting court/tribunal is obliged to give reasons for its request and provide the relevant legal and factual background of the pending case[11]. Paragraphs 2 and 3 of Article 1 underlines that advisory opinion will not include an abstract assessment of national legislation but the Grand Chamber will discuss the legal and factual background of the dispute[12].

Request submitted by national courts should pass an admissibility stage. A panel of five judges of the Grand Chamber decides whether to accept the request for an advisory opinion[13]. If the panel accepts the request, the Grand Chamber of the ECtHR delivers the advisory opinion[14].At the stage of admissibility as well as development of opinion, the panel and the Grand Chamber, include ex officio the judge elected by the European Council in respect of the Contracting Party to which the requesting court or tribunal pertains. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party will sit in the capacity of judge[15].

The Protocol does not contain criteria for the admissibility of the request. Nevertheless, according to one of the explanatory report, criteria similar to those used in relation to requests for referral of cases to the Grand Chamber should be considered as a criteria for the admissibility of the request. Advisory opinion should be delivered if the case evokes important questions related to the interpretation and application of the Convention, or if the case pertains to an important matter of general interest, or if it presents a reason for revision of case law established by the Court[16].

Reasons shall be given for advisory opinions[17] as well as refusal to accept the request[18]. Articles of the Protocol gives a right to the representatives of the Council of Europe Commissioner for Human

9 ECtHR, Reflection paper on the proposal to extend the Court's advisory jurisdiction, para. 26.
10 DH-GDR(2012)020 FINAL, pp. 3, point 8.
11 Protocol №16, Article 1(3).
12 Explanatory Report to Protocol No. 16, Article 1, para. 10.
13 Protocol №16, Article 2(1).
14 Protocol №16, Article 2(2).
15 Protocol №16, Article 2(3).
16 Advisory opinions, preliminary rulings and the new protocol no. 16 to the European convention of human rights, Janneke Gerards, 2014, p. 633; Compare ECtHR, Reflection paper on the proposal to extend the Court's advisory jurisdiction, para. 20, 22 and 30.
17 Protocol №16, Article 4.
18 Protocol №16, Article 2(1).

Rights and the High Contracting Party to which the requesting court or tribunal pertains to submit written comments and take part in the hearing. The President of the Court may also invite any other High Contracting Party or person to submit written comments or participate in the hearing. In this case, the President of the court acts in the interest of the proper administration of justice[19].

Advisory opinions which havea non-binding nature[20] are communicated to the requesting court or tribunal. The opinion is also communicated to the High Contracting Party to which that court or tribunal pertains[21].

Advisory opinions should necessarily be published. If advisory opinion does not represent, in whole or in part, the unanimous opinion of judges, any judge shall be entitled to deliver a separate opinion[22] – "In this respect, the advisory opinions resemble the 'normal' judgments of the Court"[23].

PRINCIPLE OF SUBSIDIARITY AND THE IDEA OF LEGAL DIALOGUE

In its final Declaration on advisory jurisdiction, the Committee of Ministers noted that the said jurisdiction would help clarify the provisions of the Convention and the Court's case-law, thus providing further guidance in order to assist States Parties in avoiding future violations[24]. The latter represents an enhancement of opportunities of national courts, in accordance with the principle of subsidiarity, to deliver judgment considering the European Convention on Human Right and case law before submitting requests to the European Court. This will definitely have a positive impact on the quality of national court judgments and will significantly reduce the risks of violations of rights and freedoms guaranteed by the Convention.

Principle of subsidiarity is guaranteed under paragraphs 1, 13 and 35 of the European Convention though its roots should be sought far away, in the roots of Western values. It is acknowledged that formation of the European Union is significantly based on the idea of principle of subsidiarity[25]. Later, International Criminal Court was also established based on the principle of subsidiari-

19 Protocol №16, Article 3.
20 Protocol №16, Article 5.
21 Protocol №16, Article 4 (3).
22 Protocol №16, Article 4 (2).
23 Advisory opinions, preliminary rulings and the new protocol no. 16 to the European convention of human rights, Janneke Gerards, 2014, pg. 634.
24 Explanatory Report, protocol No. 16 to the Convention for the Protection of Human Rights and fundamental Freedoms, introduction, para.1-2.
25 Francesco De Santis di Nicola, Principle of Subsidiarity and 'Embeddedness' of the European Convention on Human Rights in the Field of the Reasonable-Time Requirement: The Italian Case, pp. 2.

ty[26]. Therefore the principle of subsidiarity is a basic principle of international legal mechanisms as it acknowledges the state sovereignty and primary role of dispute resolution at the national level.

As for the reflection of the principle of subsidiary within the Convention, the Contracting Parties undertake an obligation to ensure the rights and freedoms defined in the Convention for everyone within their competences[27]. Therefore, according to the Convention, the High Contracting Parties has a primary responsibility to protect the right and freedoms guaranteed by the Convention. The mechanism for submitting requests to the European Court is considered as an auxiliary, subsidiary opportunity for the protection of human rights[28].

In spite of the fact, that in some specific context, the Contracting Parties are granted a wide margin of assessment for the usage of Convention, the principle of subsidiarity does not exclude the interference of the ECtHR in the internal procedures of the state for the protection of rights and freedoms guaranteed by the Convention. The ECtHR defines that, despite the principle of subsidiarity, it has a right and moreover – an obligation to interfere and ensure recovery of the rights and freedoms guaranteed by the Convention which have been violated by the internal mechanisms of the state. Besides, the Court defines that it can always interfere, when it considers that the judgment made by the national court diminishes occupation of the mechanisms guaranteed by the European Convention[29].

Existence of a high risk of violation of the rights and freedoms guaranteed by the European Convention is grounded by a large number of individual applications as well as judgments delivered against the states. That's why the necessity to introduce additional mechanism to reduce the risk of violation of the European Convention at the national level arose before the Court[30].

However, approach of the European court to impact on the internal processes at the national level should not be considered as the goal of the Court to have unilateral effect. This process is a part of the legal dialogue taking into account that the European court is very careful toward assessment of the judgments delivered by national courts considering the national constitutional principles and legislation specifics.

---

26 Rome Statute of the International Criminal Court, article 17.
27 Convention for the Protection of Human Rights and Fundamental Freedoms, article 1.
28 Case of Kudla v. Poland, para. 152.
29 Case of Cocchiarella v. Italy, para. 57.
30 Helfer, L. R. Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime. European Journal Int'l Law. 2008, pg. 139.

Relationship between different courts should be considered as a dialogue – more broadly, as a format of legal dialogue[31]. Importance of the cooperation between different courts was stressed at the third meeting between the Chairmen of the supreme courts and judges of central and east European countries held in 1996 in Tallinn and Parnu. Participants of the meeting agreed that judicial authorities, who are conscious of their interdependence, should necessarily engage in dialogue at national level as well as with the European Court. In their opinion, this will contribute to the confidence of the citizens in the rule of law and strengthen the protection provided by the courts[32].

The process of legal dialogue does not mean unilateral approaches but this is a bilateral process when the judgments delivered by the courts at national level might even influence the case law of the European Court of Human Rights. In particular, it is possible that the judgments delivered with deviation from the Convention will not be treated by the ECtHR as a violation of the European Convention. On the contrary, the court may change its case law based on it and establish a slightly different standard in order the later to be better adopted with the national practices and used more easily by the national courts[33]. Apart from this, legal dialogue between the courts will contribute to the globalization of the constitutionalism[34].

That is why law is not a static but combination of dynamic processes evolving constantly. In this process, courts have a vital role. In particular, courts give law a concrete meaning by application of it in the cases they decide[35].

We believe, that extending jurisdiction of the European Court of Human Rights to deliver advisory opinions should be perceived considering the context discussed above. Therefore, considering the confidence in competence and qualification of the European Court of Human Rights, possible result of the ratification of the Protocol should be assessed in terms of provision high standards for the protection of the rights and freedoms ensured by the Convention at national level.

31 Elina Paunio, Conflict, power, and understanding – judicial dialogue between the ECJ and national courts, 2010, pp 3.

32 Resolution on strengthening judicial system in the central and east European countries, "Jurisdiction of the Supreme Courts", 1996, Estonia, Tallinn, Parnu.

33 ECtHR, Reflection paper on the proposal to extend the Court's advisory jurisdiction, para.14,16.

34 Advisory opinions, preliminary rulings and the new protocol no. 16 to the European convention of human rights, Janneke Gerards, 2014, pg. 638.

35 http://jelec.iliauni.edu.ge/2015/07/13/protocol_16_full/ [last time checked – 29.06.2016].

WITH RESPECT TO SOME CRITICAL COMMENTS ON THE PROTOCOL NO. 16

Ratification of the Protocol no. 16 to the Convention was accompanied by a number of critical and different opinions.

According to the opinions of German and Norwegian experts expressed in the process of elaboration of the Protocol, non-binding character contained a risk in the sense that domestic court asking for the Court's advice might not base their judgment on the opinions delivered by the ECtHR[36].

Contrary to this, ratification of the Protocol no. 16 by the Parliament of Georgia was perceived very negative lybya small group of society. An assumption has been made that, the Government and Parliament of Georgia had to think prior to the ratification of the Protocol as despite advisory, non-binding nature of the opinion, the ECtHR would influence the process of making decision by the national courts by their inner conviction[37], which would contradict with the principle of subsidiarity.

Advisory jurisdiction of the ECtHR declared in Protocol no. 16 implies the discretion of the courts of the High Contracting Parties to follow the opinion. However, if national court neglect the opinion, the Protocol does not exclude submitting individual application to the ECtHR in the same case[38]. According to the explanatory note to the Protocol, if an individual application implies issues which have been taken into account after delivering advisory opinion, such applications will be declared inadmissible or excluded from the process of hearing casesand the ECtHR will not devote time to such cases.

According to the above mentioned, there might be a risk but seems unlikely to happen, that the High Contracting Parties asking for the ECtHR's advice will not follow the spirit and recommendations declared in the opinion. As already noted, such decisions, delivered with deviation from the interpretation of the Convention might be corrected by the possibility to submit individual applications to the ECtHR.

In this case, the following question arises: how much the advisory jurisdiction will assist the ECtHR that faces a large case load of individual applications, or in contrary, will this competence double

36 Elina Paunio, Conflict, power, and understanding – judicial dialogue between the ECJ and national courts, 2010, pp 2-3.

37 ECtHR, Reflection paper on the proposal to extend the Court's advisory jurisdiction, para.7.

38 Eva Gotsiridze, opinion about ratification of the Protocol no. 16 to the Convention for the Protection of Human Rights by the Parliament of Georgia, pg. 4-5.

its workload? As if we consider cases when national courts will not follow to the advisory opinion and the case will be shifted to the ECtHR based on the individual applications, the court will have to judge the same issue twice.

Extension of the Court's advisory jurisdiction implies increase of the Court's effectiveness within the framework of the continuing reform of the Court. It is noteworthy, that an initially increased workload is a characteristic of every reform. In this specific case, it is also possible the workload of the ECtHR to be increased considering its new competence. However, the reform will definitely be fruitful in a mid- or long-term perspective and help reduce the workload of the Court's system[39].

It is especially important that ECtHR not to deviate from the principles declared in advisory opinion. This refers to the cases when the national courts will not follow the provisions established in advisory opinions and the person will submit an individual application to the Court. In such cases, the Court should make it clear for every contracting party that, at the stage of hearing individual applications, it will not deviate from the principles and interpretations it have already established in its advisory opinion. In a long-term perspective, such approach of the Court will reduce the number of individual applications submitted to the Court as the courts of High Contracting Parties will know that there is an advisory opinion to which they should follow and avoid ECtHR to confirm the fact of violation of the Convention by its judgment[40]. On the other side, existence of advisory opinion and whether or not the courts follow the opinion, will enable potential applicant to the Court to determine possible results of submitting claims and decide accordingly whether or not to continue legal dispute. Such a condition is comfortable also for the contracting state as a party to the proceeding at the ECtHR.

The case discussed above, should not be perceived as a risk for the effectiveness of the right to submit individual applications to the ECtHR[41]. The Protocol no. 16 does not restrict the individual's right to submit its application to the ECtHR even when the domestic courts follow to recommendations declared in the opinion. Apart from this, delivering judgments according to the standards established and explained by the ECtHR contributes to the implementation of the European Convention at national level and minimizes the risk of violation of rights ensured by the European Convention.

39 ECtHR, Reflection paper on the proposal to extend the Court's advisory jurisdiction, para.8.
40 ECtHR, Reflection paper on the proposal to extend the Court's advisory jurisdiction, para.46.
41 Eva Gotsiridze, opinion about ratification of the Protocol no. 16 to the Convention for the Protection of Human Rights by the Parliament of Georgia, pg. 36-37.

Ratification of the Protocol by the Parliament of Georgia was followed by the concern related the ECtHR's influence on making decisions by domestic courts. As noted, an opinion has been expressed that despite its non-binding nature, it will obstruct the decision-making process by the national courts by their inner conviction.

We believe, that it would be unjustified if an attempt to approximate Georgian justice system with the European Standards is represented negatively. However, common opinion does not really exist toward importance of advisory opinion and its influence on national jurisdiction. Besides, is should be noted that we share the spirit of the Protocol no. 16 to help implementation of the Convention at national level.

It should be noted that in most cases, effects of the judgments of the ECtHR delivered on individual applications and advisory opinions will be the same. If we consider that interpretations established in the Court's "normal" judgments are generally considered to have so-cold *res interpretata*, under which principles and interpretations established in the Courts judgments are considered as parts of the European Convention, we will receive the situation when the case-law of the ECtHR is, in fact, binding for the contracting parties as countries are obliged to use the Convention as it is explained by the ECtHR[42].

Despite non-binding nature of advisory opinion, in fact, it will include interpretations of the rights and freedoms guaranteed by the Convention and the Court's approach considering factual and legal aspects of a specific case. Therefore, advisory opinion should be considered as a part of the Convention and *de facto* binding for the contracting party asking for such opinion[43]. In its opinion on Protocol No. 16Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe relies on the following beliefs – "The interpretation of the Convention and the Protocols thereto contained in such advisory opinions would be analogous in its effect to the interpretative elements set out by the Court in judgments and decision". Hence, although advisory opinions will not have a binding character they would nevertheless have "undeniable legal effects"[44].

[42] Advisory opinions, preliminary rulings and the new protocol no. 16 to the European convention of human rights, Janneke Gerards, 2014, pg. 634-635.

[43] ibid, pg. 635.

[44] Draft opinion, draft Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Committee on Legal Affairs and Human Rights, 11 April 2013.

Despite possible effects of advisory opinions discussed above, we believe that independence of domestic courts and the guaranty of making decisions based on their inner convictions till are not endangered. Guarantee for this should be sought not in non-binding nature of the opinion but in the essence of the right to ask an advice. Relevant domestic courts have a rights but not an obligation to ask the ECtHR for advisory opinion. Most likely, domestic courts will make such decisions when it considers that despite its competence it is necessary to comply its decision with the assessments of the ECtHR. Hence, if a national court decides to ask an advice to the competent body, such as ECtHR concerning the human rights, it will be sensible to follow then the recommendations declared in the opinion.

In addition to the above mentioned, it is important to answer the following question - will the national courts abuse their right to ask the ECtHR to deliver advisory opinion? This relates to the cases when national courts are considering cases related to the political grounds or important constitutional matter and they ask the ECtHR for opinion in order to avoid taking sole responsibility for the results of the judgment delivered by them. In such cases, making reference to the admissibility criteria, which has already been discussed within the Article, will be correct. We think, that the ECtHR will avoid getting involved in such delicate debate[45] and refuse requests from the state. Refusal might be justified by the argument that it would be preferable the resolution of a case to be made by the Court's judgment delivered upon consideration of individual application.

RATIFICATION OF THE PROTOCOL NO. 16, AMENDMENTS TO GEORGIAN LEGISLATION AND NEW COMPETENCE OF THE CONSTITUTIONAL COURT

Georgia signed the Protocol no. 16 to the European Convention for the Protection of Human Rights and Fundamental Rights on June 19, 2014. The Parliament of Georgia ratified the Protocol no. 16 under its resolution N3139-II as of March 4, 2015[46]. According to the requirements under article 10 of the Protocol, Supreme Court of Georgia and Constitutional courts have been indicated as having authority to request the Court to give advisory opinions[47].

[45] Advisory opinions, preliminary rulings and the new protocol no. 16 to the European convention of human rights, Janneke Gerards, 2014, pg. 634.

[46] Resolution N3139-II of the Parliament of Georgia as of March 4, 2015. http://info.parliament.ge/file/1/BillReviewContent/65781? – [last time checked – 5.24.2016].

[47] Explanatory Note, Protocol no. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Government of Georgia. http://info.parliament.ge/file/1/BillReviewContent/54725? – [last time checked – 5.24.2016].

In parallel to the ratification, amendments have been made to the Criminal Procedure Code[48], Civil Procedure Code[49] and Administrative Procedure Code of Georgia[50]. Amendments have also been made to the Organic Law of Georgian on the "Constitutional Court of Georgia"[51].

According to the amendments, after a constitutional claim in relation to the issues of Chapter Two of the Constitution is admitted for consideration on the merits, the Constitutional Court of Georgia can apply to the ECtHR for an advisory opinion. The request should be made regarding issues related to the interpretation and application of the rights and freedoms provided by the Convention for the Protection of Human Rights and Fundamental Freedoms and the protocols thereto.

The Constitutional Court should substantiate the request for its application to the European Court of Human Rights for an advisory opinion and submit appropriate case-related legal and factual circumstances to the European Court of Human Rights.Domestic legislation also reaffirms that advisory opinion about request for which parties are notified by the Constitutional Court is not binding.

The Supreme Court of Georgia has been equipped with similar competence in all three branches of law (criminal, civil and administrative). The Supreme Court of Georgia is authorized to apply the ECtHR for advisory opinion after admitting the claim and case for consideration. All the provisions discussed above related to the Constitutional Court equally apply to the Supreme Court of Georgia too, considering its specifics.

The said mechanisms will become effective after Additional Protocol to the Convention will come into force.

The time limit for considering the cases by the Constitutional Court as well as Supreme Court of Georgia is suspended from when they apply to the European Court of Human Rights for an advisory opinion until when the advisory opinion is obtained.

---

48 Law of Georgia "On the Amendments to the Criminal Procedure Code of Georgia", Legislative Herald of Georgia 3668-IIr, 05/06/2015.

49 Law of Georgia "On the Amendments to the Civil Procedure Code of Georgia", Legislative Herald of Georgia, 3666-IIr,05/06/2015.

50 Law of Georgia "On the Amendments to the Administrative Procedure Code of Georgia", Legislative Herald of Georgia, 3668-IIr, 05/06/2015.

51 On the amendments to the Organic Law of Georgia on the Constitutional Court of Georgia, Legislative Herald of Georgia3669-IIr, 05/06/2015.

There is an opinion about suspension of time limit for considering the cases that the procedure for delivering advisory opinion might procrastinate the procedural deadlines and obstruct administration of a quick and effective justice[52].There is no doubt, that the time limits for the consideration of the cases will more or less be extended at the national level, though according to the comments to the Protocol, in order to avoid delay in cases before domestic courts as well as in advisory opinion proceedings, it is necessary to mobilize all participants in the process as well as thoroughly accurate actions. Namely, the requesting court should formulate the request in a way that is precise, complete and in compliance with the requirements of the Protocol to avoid spending time for further clarification and submission of additional materials. Then all parties should actively and timely participate in the development of opinion including individuals and representatives of the State invited to oral hearing in the process of delivery of opinion. Separate opinions should be developed and appended to the opinion in a due time. Such approach will be a guarantee for avoiding delay in court proceedings at the national level so that the principles of effective justice and consideration of cases in a reasonable time[53].

CONCLUSION

Protocol no. 16 to the Convention equips the ECtHR with advisory jurisdiction. The High Contracting Parties will be eligible to benefit from the interpretations and recommendations of the Grand Chamber of the ECtHR related to the interpretation and application of the rights and freedomsin the context of a cases pending before it. Extending jurisdiction of the ECtHR is a part of the reform of the Court aimed at the improvement of the Court's effectiveness. Relationship between national court and ECtHR within the format of advisory opinion is considered as an attempt to strengthen legal dialogue between the courts, which will contribute to the implementation of the Convention at national level based on the principle of subsidiarity and in a long-term perspective, will reduce the case load of the Court of Strasbourg.

Advisory opinions delivered by the Grand Chamber will not be binding for the domestic courts, the later will have a discretion to follow or not to follow to the opinion. Despite its non-binding nature, there is a critics in society due to the fact that opinion delivered by the ECtHR will *de facto* have binding nature and will influence the decision-making process by national courts by their

[52] Opinion of the Legal Issues Committee of the Parliament of Georgia #547 about ratification of the Protocol no. 16, 23.01.2015.

[53] Explanatory Report, protocol No. 16 to the Convention for the Protection of Human Rights and fundamental Freedoms, introduction, para. 17.

inner conviction. Such effect of the opinion is considered to be in contradiction with subsidiarity principle (ECtHR is a subsidiary, additional mechanism and not a fourth instance).

We believe that the prevailing opinion about the legal effect of the opinion is not groundless, though we think that this should not be considered as interference in domestic courts' activities and the risk for violation of principle of subsidiarity. This opinion is strengthened by the condition that the contracting parties decide themselves whether or not to ask the ECtHR for advisory opinion.

Noncomplying to the opinion is especially mindless when despite delivery of opinion, individuals still have a right to submit application to the ECtHR in the same case. In this case, the ECtHR will surely be apt not to deviate from the provisions established by the Grand Chamber in its opinion and find violation of the provisions of the Convention, which might be avoided by the relevant decision made at the national level.

Approach of the ECtHR that it is not going to deviate from the provisions established in advisory opinion will reduce the number of individual applications submitted to the Court and the caseload in a long-term perspective. As the national courts will realize that in case of application, the opinion enables them to make judgment in compliance with the standards of the European Court of Human Rights at the national level and thus avoid the cases of violation of the Convention.

We believe, that ratification of the Protocol by Georgia and subsequently, usage of the mechanism of the Constitutional and Supreme Court of Georgia will contribute to the implementation of the Convention at national level and increase the quality of Georgian judicial decisions as it will be grounded by the recommendations based on the European Convention on Human Rights and case law about interpretation and application of human rights and fundamental freedoms.

GVANTSA KVARATSKHELIA
Consultant of the Department of Research and Legal Provision,
Constitutional Court of Georgia.

CONSTITUTIONAL PROCEEDINGS ON THE NULLIFIED OR INVALIDATED DISPUTED ACT

CONTENT

ABSTRACT

Human rights protection standards significantly depend upon the institutionally independent body supervising the government through the constitutional review of legal acts. This article reviews the significance of continuation of proceedings on the basis of nullified or invalidated norm, as the court's authority to exercise constitutional justice without procedural barriers. In order to protect human rights, the mentioned mechanism has the preventive purposes, since the Parliament is not allowed to pass the law, which is similar to that of the unconstitutional norm.

In many cases procedure rules aim to reduce the Court's caseload, which is necessary for its effective functioning. However, it is important not to cross the line, beyond which the procedural issues will hamper protection of human rights through constitutional proceedings.

The case when government is left with the leverage for manipulation and the Constitutional Court is deprived of the discretionary power in the process of constitutional justice is more dangerous. In particular, the Parliament and executive authorities still have an opportunity to annul norm until the Constitutional Court admits the claim and by doing so to automatically suspend constitutional proceedings.

The article reviews the standards established in the case law of the Constitutional Court of Georgia, in particular, cases when the proceedings on the nullified or invalidated norm continues. Through comparative analysis we will review the models adopted by various countries regarding the determination of the constitutionality of inactive norms.

I. CONSTITUTIONAL COURT OF GEORGIA AS A WATCHDOG TO PROTECT CONSTITUTIONAL HUMAN RIGHTS

1. Constitutional Court of Georgia as a Watchdog to Protect Constitutional Human Rights

The Constitutional Court of Georgia has noted in numerous cases that "Article 7 of the Constitution represents the most important guarantee for the protection of fundamental human rights, according to which "the State shall recognize and protect universally recognized human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the State shall be bound by these rights and freedoms as directly applicable law."1 Therefore, through Article 7 the Constitution establishes the State's obligation, first to recognize, and second to protect and promote human rights. Recognition of human rights by the State, first of all, implies an obligation to acknowledge them as a virtue concomitant to every human being. On the other hand, protection means that the State shall ensure all the necessary mechanisms in order to guarantee enjoyment of human rights, including the possibility to defend these rights through the court proceedings.[2] Acknowledgement of the obligation to recognize and protect human rights aims to provide all the conditions for enjoyment of these rights. Otherwise, fundamental human rights will

1 Judgment of the Constitutional Court of Georgia N 1/466 dated 28 June 2010 on the case of The Public Defender of Georgia v. the Parliament of Georgia.

2 ibid.

be violated, which would undermine the pursuit towards the rule of law.[3] While determining the scope of authority of the Constitutional Court, regard shall be given to its functional role towards protection of human rights and the control of other governmental branches as "the Constitutional Court does not administer justice only to decide on a particular case. The function of the Constitutional Court is to carry out constitutional control and hence, to rule with respect to the legal norms... Accordingly, the Constitutional Court determines, what the public order should be and what the circle of the norms defining the legislative base of the country should be."[4]

While determining the constitutionality of the normative acts adopted in relation to human rights and freedoms recognized under Chapter II of the Constitution of Georgia, the Constitutional Court of Georgia reviews the invalidated legal acts as well. Such exception was established under Article 13.6 of the Law on Constitutional Proceedings, according to which the Constitutional Court may continue the proceedings, if an impugned act is nullified or invalidated after the case is admitted for consideration on the merits in case it relates to human rights and freedoms recognized under Chapter II of the Constitution. Until 12 February 2002, there was no such record in the Law, which means that at the time of case proceedings, annulling or invalidating of the impugned legal act would definitely result in suspension of the case proceedings in the Constitutional Court. After adoption of the above referred norm, the case law of the Constitutional Court has changed in this regard. Following the legislative amendments, the Constitutional Court started to rule on the nullified or invalidated norm.

When introducing the rule related to the continuation of court proceedings regarding nullified or invalidated legal act, the legislator took into account several factors: (1) the court has an authority to review nullified or invalidated legal act only in case it relates to the human rights and freedoms protected under Chapter II of the Constitution; (2) the normative act will be reviewed only in case it was nullified or invalidated after the constitutional claim is admitted for consideration on the merits; (3) the Constitutional Court does not have any such authority at any other stage of the proceedings; (4) the Constitutional Court's authority to continue proceedings on nullified or invalidated legal act is discretionary; (5) the Constitutional Court reviews nullified or invalidated legal act only in case it is important for the purpose of ensuring constitutional human rights and freedoms.

While interpreting its authority, the Constitutional Court noted: "the Constitutional Court – considering its function, generally serves two purposes – ensuring the functioning of the government within its constitutional framework and protection of human rights from disproportionate inter-

3 ibid.
4 ibid.

ference by the authorities. As a result of this process, acknowledgement of an existing norms as invalidated as well as motivating to adopt the new norms aims at ensuring of unconditional compliance with the Constitution, which is a precise demonstration that none of the branches of the government is authorized to establish the rules contrary to the constitutional order".[5]

II. What are the Practices of the Constitutional Court of Georgia about the nullified or invalidated norm?

The Constitutional Court practice has considerably evolved in terms of continuation of proceedings towards nullified or invalidated normative act. The Constitutional Court had to terminate the proceedings in case the impugned acts were annulled, since there was no appropriate norm in the legislation regulating such situation. After adoption of Article 13.6 of the Law of Georgia on Constitutional Proceedings, the Constitutional Court interpreted the norm and used it in several cases. Accordingly, there are cases that the court examined regarding invalidated norms. Additionally, the Constitutional Court significantly differentiated amendment to the impugned norm before and after its consideration on the merits.

The first case which relates to invalidation of the norm at the stage of constitutional proceedings, is judgment of the Constitutional Court of Georgia, dated 14 August 1997 Georgian Citizen Iuri Bratslavski v. the President of Georgia.[6] On 1 August 1997 the First Collegium of the Constitutional Court admitted the claim filed by the citizen Iuri Bratslavski for consideration on the merits. Before considering the case on the merits, the respondent claimed at the open case hearing, that the impugned act was amended and since the subject of the dispute was not existing, the Court should have terminated the proceedings. The Constitutional Court terminated proceedings and stated that "the content of the impugned act has been changed and the new edition does not relate to adults. This means that the challenged part of the norm has been abolished, invalidated at the moment of considering the case on merits".[7]

On 23 June 2008 the Constitutional Court ruled on the case of Georgian Citizen Salome Tsereteli Stevens v. the Parliament of Georgia.[8] In this case, Article 44.5 of the Law on Registration of Civil

5 Ibid.
6 Judgment of the Constitutional Court of Georgia N 1/15/38 dated 14 August 1997 on the case of Georgian Citizen IuriBratslavski v. the President of Georgia.
7 Ibid.
8 Judgment of the Constitutional Court of Georgia N 2/2/425 dated 23 June 2008 on the case of Georgian Citizen Salome Tsereteli Stevens v. the Parliament of Georgia.

acts was challenged, in particular, the constitutionality of words " ... and with the approval of the Agency" in relation to Article 36.1 of the Constitution. On 25 October 2007 the First Collegium of the Constitutional Court admitted the case for consideration on merits while the Parliament of Georgia passed amendments to the impugned norm. As a result of these amendments, Article 44.5 of the Law on Registration of Civil Acts was formulated as follows: "registration of marriage with a foreign citizen or a stateless person is conducted in accordance with the Civil Code of Georgia and the rules established by law." The Constitutional Court stated regarding the formulation of the norm that the new wording of the norm does not require the approval from the Civil Registry Agency for the registration of marriage between Georgian citizen and foreign citizen. Accordingly, the challenged norm was formulated in a way that the impugned wording was excluded. In the said case the Constitutional Court relied upon Article 13.6 of the Law of Georgia on Constitutional Proceedings and continued the proceeding, notwithstanding the fact that the challenged content of the norm was abolished. The Constitutional Court suggested that continuation of case proceedings was important in terms of ensuring the protection of human rights. As a result, in the case Georgian Citizen Salome Tsereteli-Stevens v. the Parliament of Georgia the Constitutional Court ruled in favor of the claimant. The judgment of the Constitutional Court was effective from the moment of its public announcement in the court room. However, in the resolution part of the judgment was not stated that the claimed wording had to be abolished, since at the time the ruling was adopted, the wording at issue was already abolished. This precedent clearly shows that the function of the Constitutional Court does not only revolve around the interests of claimant but it is the source of interpretation and placement of the Constitutional principles within the framework of the legal order.

On 4 February 2014 the Constitutional Court ruled on the case of Georgian Citizens – Levan Asatiani, Irakli Vatcharaze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze v. the Minister of Labor, Health and Social Affairs of Georgia.[9] After the case was considered on the merits, one of the challenged Orders was invalidated and the other was amended, in which the term "homosexuality" was replaced with "man's sexual intercourse with man". The Constitutional Court in this case relied upon Article 13.6 of the Law on Constitutional Proceedings and continued consideration of the case on merits. Despite amendments to the impugned norms, the claimant still challenged the new formulation of the norm. The Constitutional Court stated that according to the Minutes of the Court made on 1 March 2013, the wording of the disputed norms admitted for consideration on merits applies the term "homosexuality", which relates to the homosexual

[9] Judgment of the Constitutional Court N2/1/536 dated 4 February 2014 on the case of Georgian citizens – Levan Asatiani, Irakli Vatcharaze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze v. the Minister of Labor, Health and Social Affairs of Georgia.

persons. The Constitutional Court further stated that, "according to the arguments provided by the claimants in the claim as well as during the consideration of the case on the merits, "homosexuality", inter alia, applies to persons covered by the new edition of the norm at issue. Therefore, the content of the amended norm is also problematic for them."[10] Before continuing the discussion on the nullified norm, the Constitutional Court paid attention to the fact that the amendments to the disputed norm were made after the case was admitted for consideration on the merits. According to the claimant, the new edition of the provision still violated the rights ensured under Chapter II of the Constitution.

The Constitutional Court has emphasized in a number of cases, "only the current regulation may induce the risk of violations of human rights guaranteed by the Constitution."[11] However, invalidation of the challenged provision may not always cause the annulment of the normative content at issue. After the norm is abolished, it may be replaced with such a provision, which fully or partly maintains the challenged normative content.

The Court noted that in case of invalidation of the norm, automatic termination of the case proceedings will result in absolute dependence of the constitutional control on the dynamic process of a lawmaking, which at the end might unreasonably complicate protection of right in the Constitutional Court and create an opportunity for abuse in the lawmaking process. That would adversely affect the effective protection of the rights guaranteed under Chapter II of the Constitution of Georgia. The purpose of Article 13.6 of the Law on Constitutional Proceedings is not to allow the legislator to abuse the process of lawmaking.[12]

The Constitutional Court in its judgment dated 4 February 2014 noted that the new edition of the norm somehow repeats the normative content of the old edition. In addition, the respondent's explanations show that the legislator's attitude towards the content of the challenged provision has not changed and the risk to infringe the claimants' rights on the same grounds still exists.[13] The Constitutional Court is limited by the scope of the dispute and consequently, it could not judge the new editions of the norms established as a result of amendments passed on 8 October 2013.

10 Ibid.

11 Judgment of the Constitutional Court of Georgia N1/494 dated 28 December 2010 on the case of Georgian Citizen Vladimer Vakhania v. the Parliament of Georgia.

12 Judgment of the Constitutional Court of Georgia N1/1/386 dated 23 December 2008 on the case of Georgian Citizens – Shalva Natelashvili and Giorgi Gugava v. the Georgian National Energy and Water Supply Commission.

13 Judgment of the Constitutional Court N2/1/536 dated 4 February 2014 on the case of Georgian citizens – Levan Asatiani, Irakli Vatcharaze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze v. the Minister of Labor, Health and Social Affairs of Georgia.

However, discussion on the invalidated edition of the norm challenged by the claimant is the preventive remedy for the protection of his/her rights since according to the paragraphs 4 and 41 to Article 25 of the Organic Law on Constitutional Court it is inadmissible to adopt/issue a legal act that contains the same standards that have been declared unconstitutional by the Constitutional Court. At the same time, if the Constitutional Court determines that a disputed normative act or its part contains the same standards that have already been declared as unconstitutional by the Constitutional Court, it delivers a ruling on the inadmissibility of the case for consideration on the merits as well as recognition of the disputed act or its part as void.

According to the above mentioned, the Constitutional Court found that consideration of the constitutional claim on the merits and ruling thereon is especially important for the protection of claimants' rights and freedoms. Accordingly, the Constitutional Court relied upon Article 13.6 of the Law on Constitutional Proceedings and continued the proceedings in order to determine the constitutionality of the term "homosexuality" existing in the editions of 27 September 2007 and 5 December 2000 of the challenged legal acts. The Constitutional Court satisfied the claim and found that the contested wording of the disputed acts was unconstitutional.[14]

The Constitutional Court produced different legal outcome on the case of Publishing dated 24 June 2014.[15] In this case the disputed norm was amended before the case was admitted for consideration on the merits. It is noteworthy that the amendments were not substantial, since only some words were changed that did not result in improvement of the problematic aspects of the normative content of the disputed legal act.[16]

Pursuant to Article 13.2 of the "Law on Constitutional Proceedings" the withdrawal of a claim, as well as the annulment or invalidation of the challenged act at the time of the hearing, result in the termination of the proceedings in the Constitutional Court, except for the cases provided for by paragraph 6 of this article." Taking into account this provision, the Constitutional Court noted that it should have decided whether after adoption of the Order N129/N of the Minister of Education and Science of Georgia dated 6 September 2013 the impugned norms should be considered invalidated.

---

14 Ibid.

15 Judgment of the Constitutional Court of Georgia N1/3/559 dated 24 June 2014 on the case of Intelect Publlishing LLC, Artanuji Publishing LLC, Diogene Publishing LLC, Logos Press LLC, Bakur Sulakauri Publishing LLC, Triasi Publishing House LLC and the Georgian Citizen Irina Rukhadze v. the Minister of Education and Science of Georgia.

16 The term "center" was replace with the term "ministry". In addition, the words "conciliation commission" were replaced with the words "Commission for classification."

The Court noted that pursuant to Article 25.1.c of the Law of Georgia on Normative Acts, A normative act or its part becomes invalid if "a decision that invalidates the normative act is adopted". In the case at hand, new edition of the disputed norms were adopted. According to the explanations of the Constitutional Court, the disputed norms that existed at the moment of the filing the claim, stopped to operate and were replaced by other effective norms. According to the Constitutional Court new wording of the norms per se mean invalidation of the old norms. Therefore, there is no need for a special reference.

According to Article 13.2 of the Law on Constitutional Proceedings, before admitting the constitutional claim for consideration on merits, in case of recognition/acknowledgment of the challenged norm as nullified or invalidated, the Constitutional Court is not authorized to assess the quality of the amendment made to the disputed act and based on it to decide whether to admit the act recognized as invalidated for consideration on the merits. According to the Constitutional Court, in order to terminate proceedings under Article 13.2, it is sufficient the authorized body to acknowledge it as abolished or invalidated. In addition, the Law on Constitutional Proceedings does not allow consideration of the new edition of the norm without respective lawsuit. The court cannot decide on the constitutionality of the norms which are not referred in the constitutional claim, even if the new norm has a similar content with that of the challenged provision.

In the Publishing's case, judge Maia Kopaleishvili expressed a separate opinion.[17] The separate opinion argues that there are grounds for consideration of the constitutional claim on the merits even if the norm was amended before examination of the case. The judge believed that the purpose of Article 13.2 of the Law on Constitutional Proceedings when assessing the compliance of the challenged act with the Constitution is to ensure effectiveness and efficiency of the constitutional proceedings. Discussion on nullified or invalidated legal act except otherwise provided by law does not serve the purposes of the constitutional proceedings. Hence, the terms of the disputed norm – "invalidation or annulment should be interpreted in the light of the normative content of the amendments made to the disputed norm."

According to the judge Maia Kopaleishvili, "for the purposes of constitutional proceedings, disputed act is invalidated or nullified, when it does not exist with the same normative content constitutionality of which was disputed by the claimant. Therefore, all the amendments made to the challenged norm shall not result in termination of the court proceedings and each case should

[17] Separate opinion of the member of the Constitutional Court of Georgia Maia Kopaleishvili on the judgment of the First Collegium of the Constitutional Court N1/3/559 dated 24 June 2014.

be assessed on individual basis, taking into account whether the norm amended or edited by the authorized subject maintains the same normative content."

The separate opinion stated that the editorial amendment may result in termination of court proceedings only if it is established that as a result of amendments made to the challenged act the normative content of the act which was disputed by the claimant in the constitutional claim is nullified.[18] If the amended norm has the same effect on the claimant as it had before the amendments were passed, then the Court should judge the constitutionality of the disputed norm, since the validity of the norm is related to its legal impact.

III. MODELS OF PRELIMINARY CONTROL OF THE INVALIDATED NORM AND ITS LEGITIMACY

The purpose of individual application to the Constitutional Court is to protect and recover the violated rights or to avoid the future alleged violations. The wording in the law regarding discussion on the invalidated norm served the purpose of ensuring an effective protection of human rights in a way that would not give the manipulation mechanism to the State.

According to Austrian lawyer, Hans Kelsen, the norm is valid only when it is consistent with the Constitution and its validity is proved by the way of determining its constitutionality.[19] Kelsen believed that everything the legislative body adopts as legislative act, shall be considered as law. In addition, there is a presumption of constitutionality of the norm, until it is declared unconstitutional.

The reason for validity of the norm shall be the Constitution. It is impossible to say that the invalidated norm is unconstitutional, since such norm is legally nonexistent. Therefore, it is impossible to make any legal statement in relation to it. The norm may be annulled not only through ordinary constitutional procedure, in particularlex posterior derogat priori meaning that the new law abolishes the previous one, but also through special procedure set forth by the Constitution.

Discussions related to the constitutionality of the invalidated norm as a preliminary (ex ante) control is not unusual for the constitutional models of various countries. Preliminary control of the norm, by its nature is abstract control, which means that the norm is assessed not according to the particular case but generally.[20] Decision adopted as a result of preliminary control is binding.

18 Ibid.

19 Kelsen H., Pure Theory of Law, Translated by M. Knight, Los Angeles, London, 1967, 271.

20 Juliane Kokott, Martin Kaspar, "Ensuring Constitutional Efficacy", in Michel Rosenfeldn, Andras Sajo (eds.), *Comparative Constitutional Law, the Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, pg. 806.

In many cases there are specific claimants foreseen for the preliminary control. For example, the claimant can be the President, the Government, Head of the Parliament and the Members of Parliament. Those are the people who draft legislative proposals and transfer them to the special body to determine their consistency with the constitution.

Article 61 of the French Constitution provides that as a result of the preliminary control the Constitutional Council shall make decision within one month, which at the request of the government can be reduced to eight days. Legal experts believe that in such a short period of time the decision will be shallow.[21] The decision regarding the constitutionality of the norm is made by the Constitutional Council. Except France, the preliminary control of the norm is established in Austria, Bulgaria, Czech Republic, Latvia, Lithuania, Poland, Romania, Slovakia and Spain.

Preliminary control plays an important role in enhancing the constitutional effectiveness. In particular, this means that it is possible to suspend adoption of the unconstitutional act before the particular damage occurs.[22] However, it should also be noted that ex antecontrol might be a problem for political processes. Often because of this argument, States refuse to introduce preventive control of the norm, since in such case the courts become involved in everyday political debates. This gives rise to the problematic issues in terms of constitutional balance of powers.[23] That is why the US Supreme Court refused to conduct ex ante control when it was requested by George Washington.

The binding nature of the decision made by the Constitutional Council demonstrates its role and function. The Council's decision is mandatory for the political powers. In this case, political powers are not only in their private capacity, since the Constitutional Council supervises their policies. At the same time, we should bear in mind the place of the Constitutional Council in the government. According to the French Constitution the Constitutional Council is not a branch of judiciary and it does not perform the function of the judiciary, but its duty is to assess the con-

[21] Juliane Kokott, Martin Kaspar, "Ensuring Constitutional Efficacy", in Michel Rosenfeldn, Andras Sajo (eds.), *Comparative Constitutional Law, the Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, pg. 806.

[22] Juliane Kokott, Martin Kaspar, "Ensuring Constitutional Efficacy", in Michel Rosenfeldn, Andras Sajo (eds.), *Comparative Constitutional Law, the Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, pg. 806.

[23] Juliane Kokott, Martin Kaspar, "Ensuring Constitutional Efficacy", in Michel Rosenfeldn, Andras Sajo (eds.), *Comparative Constitutional Law, the Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, p. 807.

stitutionality of the legislative proposal presented by the executive and legislative branches.[24] Consequently, administering constitutional justice is a part of the Constitutional Council's function but at the same time the Council is the body supervising the executive branch until the law takes effect.

Preliminary control of the norm is provided in the legislation of the Republic of Serbia as well. In particular, Article 169 of the Serbian Constitution and Article 66 of the Law on Constitutional Court envisages examination of the norm's constitutionality by the Constitutional Court before its publication. The law adopted and approved by the Secretary of the National Assembly, can be submitted to the Constitutional Court for assessment of its constitutionality before its publication. The Constitutional Court shall notify the President of the Republic of Serbia that the constitutionality assessment procedures of the unpublished law were initiated. The reason for informing the President of the Republic of Serbia is that he/she shall sign and publish the law within 15 days.

Determination of the constitutionality of the law that is passed but still has not taken effect might also be requested by at least 1/3 of the Serbian Parliament. An importance of this mechanism is emphasized in the provision of the Constitution of Serbia, according to which once the constitutionality of the unpublished norm is established it is prohibited to initiate proceedings in the Constitutional Court concerning the same norm, since it was already recognized as constitutional/unconstitutional.

Therefore, countries not only recognize the mechanism of control on the nullified norm but also conduct preventive control on the not-yet-effective norm. Both of the models assess the non-effective norm and serve the purpose of strengthening human rights protection mechanisms. ex ante control and continuation of proceedings on invalidated norm have common goals such as minimizing damage when protecting human rights and binding the government with the constitutional principles.

IV. LEGAL NATURE OF CONSTITUTIONAL NULLIFICATION: COMPARATIVE ANALYSIS

IV.1 General Overview

Together with the overview of the legal proceedings regarding nullified or invalidated norm it is critical to consider an authority of the Constitutional Court towards the scope of the claim. The court might be constrained to examine invalidated norm but it might be granted a wide discretion towards the scope of the claim. This often becomes the reason for reviewing the new normative act after abolishment of the previous normative act.

[24] https://www.constituteproject.org/constitution/France_2008?lang=en

Experience of the Constitutional Courts with regard to the scope of the claims is different. In particular, the court is not authorized to go beyond the scope of the claim presented by the claimant in Georgia, Belgium, the Czech Republic, France – within a posteriori control, Hungary, Luxembourg, Montenegro, Poland and Sweden.[25] However, in some countries, the Constitutional Court is allowed to do so and review the constitutionality of the law as a whole, as well as of the normative acts related to the challenged norms. Such a system exists in Algeria, Austria, Belarus, Brazil, Croatia, Estonia, France – in the context of a priori control, Serbia and Slovakia.[26]

Regulation of the procedural matters of the Constitutional Courts is aimed at reducing the caseload of the court in a number of cases. However, considering the regulation of procedural issues and the established practice of the Court the role of Constitutional Court can be assessed as an effective mechanism within the country's constitutional order for the protection of human rights. For example, when there is a public interest, number of Constitutional Courts do not terminate proceedings even if the claimant withdraws the claim. Such regulations show the autonomy of the Constitutional Court and a reflection of effectiveness of its function not only in relation to claimants, but in general in the process of establishing the constitutional standards.

From the standpoint of a smooth operation of the human rights protection mechanisms in Georgia, the issue of legal proceedings with regard to the nullified or invalidated norm has recently become relevant. The topic gradually acquired its relevance and eventually became subject of the dispute in the Constitutional Court. Examples provided above show that a number of the impugned norms within the Constitutional Court are nullified or amended by the Parliament or the executive branch before the case is admitted for consideration on merits.

There is no shared opinion on the issue whether the Constitutional Court should be able to continue proceedings when the challenged norm is declared invalid and ceases to operate.[27] In some countries such as Austria, Czech Republic[28], Belarus, France, Montenegro[29], Portugal, Slovakia[30], Sweden and Ukraine the Constitutional Court terminates proceedings once the challenged norm is nullified. However, in other countries the Constitutional Court continues proceedings on the nullified norm and declares it unconstitutional. Administration of such control is the court's discretion in Liechtenstein and Serbia. Also, continuation of examination of the invalidated norm is limited in specific cases in Poland and in Croatia, where continuation of the proceedings is allowed when such is necessary for the prevention of human rights' violations.

25 Report of the Venice Commission on Individual Access to the Constitutional Justice, Strasbourg, 2011, 43.
26 Ibid.
27 Ibid, page 40.
28 Article 67 of the Law of Czech Republic on the Constitutional Court.
29 Article 65 of the Law of Montenegro on the Constitutional Court.
30 Slovakia's Constitutional Court has recently developed a new practice, which differs from its previous practice. In particular, the general courts can appeal against the norms, which have been adopted invalid, but are still used in specific cases.

IV.2 Continuation of the Proceedings on the nullified Norm in Poland, Serbia and Croatia

Report of the Venice Commission notes that unequivocal termination of the legal proceedings on nullified norm would be insufficient measure for the protection of human rights in case of specific constitutional control. The balance between the government branches for the purposes of protection of human rights is effectively achieved when the Constitutional Court's powers are unreasonably limited, and the government is left with room for manipulation. The fact of procedural abolition of the norm shall not be determinant for human rights violations, since State responsibility is not only limited to procedural actions but it is also accountable before the individual who suffered harm as a result of legislation. Experience of a number of countries show the significance of Constitutional Court's wide authority with regard to human rights protection when discussing nullified norm.

Under Article 39.3 of the Polish Law on the Constitutional Tribunal, in case the norm is nullified before the court announces its ruling the Constitutional Tribunal does not terminate proceedings, if it believes that adoption of the judgment is necessary for the protection of human rights and freedoms.[31] Such a regulation sufficiently confers the Constitutional Court with the power to protect human rights from the procedural manipulations by the executive branch. In this respect the discretionary powers of the Constitutional Court of Georgia is restricted by the stage of admitting the claim for consideration on the merits, failing which deprives the Constitutional Court to determine whether there is a violation of human rights by the government.

Serbian Constitutional Court is not also limited by the stage of proceeding. In particular, according to Article 64 of the Law of Serbia on the Constitutional Court, if the challenged norm was invalidated during the court proceedings before adoption of the ruling, the Constitutional Court may continue proceedings and assess the constitutionality of the norm.[32] Despite this, the Constitutional Court of Serbia also reviews the constitutionality of the individual legal acts. While determining an issue of proceeding related to the nullified individual legal act, the Court relies on whether the claimant's legal situation was changed after the challenged act was nullified. The proceedings will continue if the Court finds that after the act was nullified, the disputed issue has not improved for the claimant.

According to the Croatian Law on the Constitutional Court the Constitutional Court is entitled to assess the constitutionality of the invalidated law or its specific provisions prior to filing the claim. Limitation period for the assessment of constitutionality of the invalidated legal act is one year from its announcement as invalidated.[33] In addition, in the course of proceedings in the Consti-

[31] Article 39.3 of the Polish Law on the Constitutional Tribunal http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitutional-tribunal-act/

[32] Article 64 of the Law of Serbia on the Constitutional Court. http://www.ustavni.sud.rs/page/view/en-GB/237-100030/law-on-the-constitutional-court

[33] Croatian Law on the Constitutional Court (adopted on 3 May 2002) Article 56.1. http://www.legislationline.org/documents/action/popup/id/6008

tutional Court if the challenged act is nullified or amended, the Court continues proceedings and adopts the respective judgment.[34]

According to examples provided above, after the claim is filed the discretionary right to assess the nullified norm is fully within the powers of the Constitutional Court since it is the body administering constitutional judiciary and restricting it by the procedural stages will result in disproportional limitation of the balance between the government branches in the process of human rights' protection. Deliberation about inactive norm is an essential element of State responsibility and accountability. Nonexistence of such a mechanism would be a gross violation of the right to fair trial for the purposes of human rights' protection and would be inconsistent with the constitutional principles. State responsibility should be determined not only through procedurally operating norms but through the effect caused by its legislative activity.

CONCLUSION

Proceedings on the nullified norm can be considered as one of the important aspects for effective constitutional justice. Positive aspects which are characteristic for examination of the not-yet-effective or later nullified norm, led the States to bring their laws in compliance with the constitutional principles.

The said authority of the Constitutional Court ensures excludes manipulation by the executive branch. Considering Georgian reality, such leverage is not completely removed from the executive government since if the norm is nullified before its consideration on the merits the court cannot continue the proceedings. This leads the representatives of the governmental branches to amend the edition of the norm at any stage of the court proceedings so that the normative content remains the same. Additionally, filing claim regarding the amended wording of the norm unreasonably delays protection of the claimant's rights.

Apart from the control mechanism, the Constitutional Court's rulings on nullified norm creates a precedent and guidelines for the adoption of constitutional normative acts. At the same time, immutability of the ruling of the Constitutional Court is one the important aspects, which is why the constitutionality of the nullified norm should be examined. Dispute on the provision that is already recognized as unconstitutional is not permitted and this binds the legislator and gives it instructions in advance not to adopt such a norm content of which will violate the human rights.

[34] Ibid, Article 57.1.

NINO KASHAKASHVILI
PhD Candidate, Ivane Javakhishvili Tbilisi State University.

POLITICAL PARTIES FOR DEMOCRACY AND CHALLENGES OF LEGISLATIVE POLICY

ABSTRACT

Ensuring engagement of the population is the core precondition for the existence of the political party as an institute. The same idea is the source of its legitimation. This essence considers political party as an indivisible element for the government's democratic functioning. If a political party is discussed from this perspective, does public governance have an obligation "to protect inner party democracy"? To put it in other words, is it mandatory for the legislator to act in the area of a political party not only *ad extra* but also regarding the mentioned unification *ad intra*. Do there exist challenges (factual or ideological) that lead to the increase of legislative regulation?

INTRODUCTION

Political parties bear defining role in managing democratic processes. It is presumed that political parties will lead the social and political dialog. Thus, they will mobilize society, move forward interests of different groups that consequently must be expressed in the agenda of the party. Existence of such presumptions towards political parties turns the role of the parties into essential one. Accordingly, it is crucial, what kind of legal regulations will be set forth regarding their activities. Recent tendencies illustrate that states tend to 'the more regulations', which add significance to the factor of the legislator. According to the position presented in the paper, taking into account existing challenges in modern democratic processes, more regulation would possibly facilitate

the stimulation of the inner democratic processes in parties (with sub-aim), the engagement of a maximum vast number of population in decision making process (with the general aim).

For the political parties, context stipulates the frame of the legislation set by the government, broadly speaking – historical development, constitutional order, and governmental vector.

Guidelines on Political Party Regulation, adopted by the European Commission for Democracy through Law (the Venice Commission) discuss the best options for regulation that should meet the following criteria: (1) minimal legal regulation and (2) establishment of clearly defined limits.[1] However, minor regulation may cause chaotic political life.[2]

Forming regulatory legislation is a challenge for the state authorities, however, transnational process and identical challenges establishes the same approaches – the so-called good practice, that can considerably assist the legislator. Approaches can be different and legislators themselves should make the decision.

While setting the legal limits for the political parties, it is crucial to act with the same general philosophy (assumption) that political parties are the fundamental components of the development and maintenance of democracy. The object of the paper, while having this ideological approach, is to look for the answers to the following questions: what limits should legislator have in the sphere of the regulation of political parties? What function does the political party have in ensuring democracy? How can be achieved the inner activities to be in accordance with democratic principles?

Comparative, analytical, logical and historical research methods are used within the framework of the research.

The paper consists of an introduction, two chapters and the conclusion. The first chapter seeks theoretical answer on the matter such as the role of political parties in the effective work of democracy. Analyzing mentioned matter, is vital to form not fully unambiguous, but reasonable ideas concerning the limits of legal frames (ignoring the context is impossible). Discussion about democracy, political parties, basic concepts on legislator will be elaborated in this chapter. Acting area for the legislator is not only the political party *ad extra*[3], but above mentioned unions *ad intra*,

1 CDL-AD(2010)024, *Guidelines on Political Party Regulation,* adopted by the European Commission for Democracy through Law (Venice Commission), Venice, 15-16 October 2010, 7.

2 Kenneth Janda, Adopting Party Law, Political Parties and Democracy in Theoretical and Practical Perspectives, National Democratic Institute for International Affairs, 3 (2005).

3 Terms (a) *ad extra* and (b) *ad intra* are used with following meanings in the paper: (a) means action or result that has external effects, while (b) means action or result that will have inner effect in the association.

inasmuch as democratic process has ideal goal and political parties are core elements of authority in the modern world.

In the second part of the paper, analyses will be made based on the idea that political party should not turn into the reflection of a political elite. Accordingly, the second part will discuss possible measures for ensuring inner party democracy. Thus, this part will cover practical matters.

I. PRINCIPAL FICTIONAL PLAYER OF DEMOCRACY – POLITICAL PARTY AND LEGISLATOR

I.1. For the Definition of Legislative Politics and Political Party

There is a great number of papers concerning the role and functions of political parties. However, it is not an unambiguous institute.[4] There are two main directions concerning political parties in scholar literature: (1) global and (2) individual. The first one perceives organization as an actor according to its social goals, while the second one directly links it with the interests and preferences of the politicians.[5] Although, these are two different sides of the same coin and political party can cover both definitions, however, analyzing from the angle of social purposes is more comfortable for the society.

While discussing political parties we should take into consideration axiomatic definition that was used in the middle of 20th century – organization's main aim is to gain power and control.[6] It is to be mentioned that Hans Kelsen (1881-1973) considered the role of the political parties so essential in the modern state that he used to refer to the recent as *parteienstaat*[7].

In liberal democracies, political party can be the organization that acts according to the principles of "transparent functioning, stability and political accountability".[8] On the other hand, political party is characterized by having different prioritized directions. To be more precise, they are

4 Jonathan R. Macey, *The Role of the Democratic and Republican Parties as Organizers of Shadow Interest Groups*, 89 Mich. L. Rev. 1 (1990).

5 Thomas Saalfeld & Kaare W. Strøm, Political Parties and Legislators, the Oxford Handbook of Legislative Studies, Eds. Shane Martin, Thomas Saalfeld & Kaare W. Strøm, 381 (2014); James A. Gardner, *Can Party Politics Be Virtuous?*, 100 Colum. L. Rev. 667 (2000).

6 Anthony Downs, An Economic Theory of Political Action in a Democracy, 65 JPE 135, 137(April, 1957)

7 party-state.

8 Thomas Saalfeld & Kaare W. Strøm, Political Parties and Legislators, the Oxford Handbook of Legislative Studies, Eds. Shane Martin, Thomas Saalfeld & Kaare W. Strøm, 373 (2014).

more oriented on elections, gaining state authority and changing policy.[9] However, the most logical assessment regarding political parties, apart from other political organizations,[10] is deemed to have an aim to win the elections.[11] In the case of their success, they converse in legislative party implementing legislative politics corresponding to its ideology.

I.2. Political Parties – Against or in Favor of Democracy?

Political parties are the most important means of participation in governance for citizens. The interaction between political parties and democracy is seen from different angle. It is noted, that parties are essential for democratic functioning (this is the most popular and cited opinion)[12], the same idea supposes that "political parties created democracy"[13]. According to the opposing idea, political parties create danger for the democracy. Matter of citizen's engagement in political parties needs to be analyzed deeply, taking into consideration the following question: is every political party democratic or not? The answer to this question is – no, in every case.[14] Thus, it needs to be analyzed how the low level of inner democracy interferes with democratic processes in the state.

In the modern period, debates concerning political parties are generated with the historical arguments. During the end of the 19th century, different views were considered about the significance and importance of the existence of political parties. If liberals considered representative institutions as the best means for ensuring popular sovereignty (that was composed of political parties), sceptics perceived a risk, as political parties "were creating barrier between people and society".[15] The latter stipulation implied artificial division of the population that could consequently

9 Kaare Strom, *A Behavioral Theory of Competitive Political Parties*, 34 Am. Polit. Sci. Rev. 565, 566-568 (1990)

10 For instance, initiative groups, social organizations. See. Thomas Saalfeld & Kaare W. Strøm, Political Parties and Legislators, the Oxford Handbook of Legislative Studies, Eds. Shane Martin, Thomas Saalfeld & Kaare W. Strøm, 372 (2014)

11 Thomas Saalfeld & Kaare W. Strøm, Political Parties and Legislators, the Oxford Handbook of Legislative Studies, Eds. Shane Martin, Thomas Saalfeld & Kaare W. Strøm, 372 (2014)

12 Juan J. Linz, Parties in Contemporary Democracies: Problems and Paradoxes, Political Parties: Old Concepts and New Challenges, Eds. Richard Gunther, José Ramón Montero & Juan J. Linz, Oxford University Press, 291 (2002). This role of political parties was firstly noted by Kelsen in "The Essence and Value of Democracy" (929) ("it will be lie and hypocrisy to believe that democracy can exist without political parties. Democracy inevitably and unavoidably represents the state of parties"); Hans Kelsen, On the Essence and Value of Democracy, Weimar: a Jurisprudence of Crisis, Eds. Arthur J. Jacobson & Bernhard Schlink, 92 (2000)

13 Thomas Saalfeld & Kaare W. Strøm, Political Parties and Legislators, the Oxford Handbook of Legislative Studies, Eds. Shane Martin, Thomas Saalfeld & Kaare W. Strøm, 373 (2014)

14 Yigal Mersel, *Hans Kelsen and Political Parties*, 39 Isr. L. Rev. 158, 168 (2006); see Gregory Fox & Georg Nolte, Intolerant Democracies, Democratic Governance and International Law, Eds. Gregory Fox & Brad R. Roth, 389-435 (2000).

15 Bruce D. Graham, Representation and Party Politics, Ed. Gillian Peele, Oxford, 3 (1993).

be connected to the restriction of the freedom of expression and possibly, nullifying functional concept of representation.[16]

Alexis de Tocqueville (1805-1859) attempted to illustrate above mentioned problems and approaches. In 1831-1832 he tried to study American democratic society and published his analysis in the book named *De la Démocratie en Amérique*.[17] The scheme of political parties' empowerment is essential among Tocqueville's results: equality, individualism and unity. To be more precise, he differentiated two categories: (1) equality of conditions and (2) emotional will of equality.[18] In the first one, he considered equality before the law and in the latter one, an inner will of equality – that makes person more motivated.[19] According to Tocqueville, consequently each member of society becomes more individual. Regarding him, Americans showed an important lesson in precondition of individualism – cooperation, expressed in forming unions. Hence, it can be assumed that political party is cooperative expression of achieving values of purpose. John Stuart Mill (1806-1873)[20] and Walter Bagehot (7954-1919)[21] have expressed their ideas about political party, as an actor ensuring democracy.[22] Considerations of Moisey Ostrogorsky (1854-1919) about political unions worsening and weakening idea of representation are broadly discussed in doctrine as well.[23]

Hans Kelsen's philosophy, regarding political parties, does not lose its relevance. Actual representation is pure fiction and political parties are mediators among representatives and electorate according to his perspective.[24] They are conditioning social consensus. Talking about political parties and democracy, Kelsen puts stress on the notion of people and divides them in two categories with following characteristics: whether they have will to participate in decision making process or not. This does not fall in the interest sphere for one group, while for another one this is vice versa and only this recent group is the political party.[25]

16 Ibid.
17 Ibid.
18 Ibid.
19 Ibid.4.
20 See.John Stuart Mill, Considerations on Representative Government, Essays on Politics and Society, Ed. John M. Robson http://oll.libertyfund.org/titles/234 (last visited on 28.05.2016).
21 See. Walter Bagehot, The English Constitution (1873) http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/bagehot/constitution.pdf (last visited on 28.05.2016).
22 Bruce D. Graham, Representation and Party Politics, Ed. Gillian Peele, Oxford, 10 (1993).
23 See. Moisei Ostrogorski, Democracy and the Organization of Political Parties (1902) https://archive.org/details/democracyandtheo031734mbp (last visited on 28.05.2016).
24 Hans Kelsen, On the Essence and Value of Democracy, Weimar: a Jurisprudence of Crisis, Eds. Arthur J. Jacobson & Bernhard Schlink, 97 (2000).
25 Ibid.91-92.

Based on the tendentious approach, political party is the one that ensures democracy, as it protects individual freedom of person (opposition role)[26] and implements political freedom.[27] Thus, it had not been always this way – political parties were considered as negative elements,[28] which was reflected in their legal ignore. Consequently, history of political parties as the direct object of regulation stars from 1940.[29] If political party is discussed as stimulating element of democracy, public government has obligation "to protect democracy of parties" as well.[30]

I.3. Fulfillment of Constitutional Goals and the Factor of the Legislator

Purposes and regulations set forth in different countries' constitutions aim for an ideal state that can be achieved with "technical" tools. Certain models of government form a major structure and political parties are main elements of it. Hence, in most cases political parties are mentioned in national constitutions itself, but are not regulated in details. This tendency is common for constitutions of last wave of democracy.[31] According to Kelsen, political parties have constitutional role and in this context, its constitutionalisation tendencies are understandable.[32] The Venice Commission in Guidelines on Political Party Regulation prescribes ideal model, which includes functions and role of parties to be set forth in the supreme legal act of the state.[33]

There are different extent of regulations on political parties in supreme political-legal acts. For instance, constitutions of Latin American countries prescribe regulation, that guarantees inner party democracy and furthermore, they regulate nomination issues in constitution. Article 21, paragraph one Basic Law for Germany sets forth, that inner organization of the political party must be in compliance with the principles of democracy. Article 51, paragraph 2 of Portuguese constitution, considers the following basic principles for political parties: transparency, democratic organization and governance, in addition, participation in political party activity of its each member.

26 Ibid.93.

27 Ibid.86-87.

28 concept of Rousseau on "general will" see. Yigal Mersel, *Hans Kelsen and Political Parties*, 39 Isr. L. Rev. 158, 160-162 (2006); Pippa Norris, Building Political Parties: Reforming Legal Regulations and Internal Rules, Report commissioned by International IDEA, 3 (2004).

29 CDL-AD(2010)024, Guidelines on Political Party Regulation, adopted by the Venice Commission at its 84th Plenary Session, Venice, 15-16 October 2010, 6. However, Article 147 of constitution of Austria, 1920 restricted possibility for constitutional court judge to cooperate with political parties.

30 Irakli Kobakhidze, Law of Political Associations, Tbilisi, 79 (2008).

31 Thomas Carothers, Aiding Democracy Abroad: The Learning Curve, Carnegie Endowment for International Peace, Washington D.C., 160–61 (1999).

32 Hans Kelsen, On the Essence and Value of Democracy, Weimar: a Jurisprudence of Crisis, Eds. Arthur J. Jacobson & Bernhard Schlink, 92 (2000).

33 CDL-AD(2010)024, Guidelines on Political Party Regulation, adopted by the Venice Commission, Venice, 15-16 October 2010, 12.

Article 26 of Andorra's constitution indicates on democratic organisation of political parties'. Article 6, constitution of Spain considers that inner structure and functions of political parties should be democratic.[34]

Political party and dynamics of party system guarantee implementation of the constitution.[35] This perspective is empirically proved, as the stability of the system of political parties is linked to the ability of the state having an adequate reaction on radical ideology of the political parties.[36] In this context, empowerment of political parties in this context and defining states regulatory policy become more crucial.

Legal Framework for political parties depends on the choice of the legislator, whether they opt in favor of liberal (a legal reflection of a party autonomy) or more regulated (ensuring democracy) systems.[37] Choice of the system is conditioned by historical experience as well as and mostly by modern challenges. It is to be noted, that nonexistence of specific legislation regulating political parties is not the "requirement of democracy".[38] In order to achieve constitutional goals, standards that are agreed in doctrine regarding legal regulations, forthcoming legal principles should be followed: impartiality, freedom and justice.[39] According to other approaches, regulation of political parties' law includes legislation management with four main principles: (1) freedom (2) equality (3) inner democracy (4) transparency.[40] Legislators actions are faced with certain challenges due to framework set by those principles.

According to the recent researches, the tendency is the following – from liberal to more regulated approach.[41] Adopting special laws regarding political parties is extremely popular.[42] From this point of view, the question of inner democracy is in the spotlight. The Venice Commission outlined

34 See constitution of Costa Rica (Article 95) and constitution of Turkey (Article 69) on the democratic principles of political parties' functioning.

35 Cindy Skach, Political Parties and the Constitution, Oxford Handbook of Comparative Constitutional Law, Eds. Michel Rosenfeld & Andras Sajo, 875 (2012).

36 Facism in Germany.

37 CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 3.

38 CDL-AD(2010)024, Guidelines on Political Party Regulation, adopted by the Venice Commission, Venice, 15-16 October 2010, 12.

39 Pippa Norris, Building Political Parties: Reforming Legal Regulations and Internal Rules, Report commissioned by International IDEA, 5 (2004).

40 Irakli Kobakhidze, Law of Political Associations, Tbilisi, 69 (2008).

41 Fernando Casal-Bértoa, Daniela Romée Piccio & Ekaterina R. Rashkova, *Party Law in Comparative Perspective*, Economic and Social Research Council & European Research Council, Working Paper 16 (March 2012).

42 CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 7.

three groups of states pointing to the inner democracy (1) special legislation on political parties with no regulations of inner democracy, (2) apart from the first type; legislation has indications about inner democracy (3) the third type of the states that use non-specified legislation about associations regarding political parties.

Gradually, political parties lose orientation on public interest.[43] However, according to Kelsen's theory, political parties are mostly acting on behalf of public interests, even though they may not be acting in accordance with the will of the electorate.[44] To sum up, societal control of the politics without political parties is hardly imaginable. To put in another words, implementation of political constitutional values – material democracy is utopia without political parties. Enjoying freedom of association itself, ensures "creating proper conditions" for exercising rights guaranteed by constitution and international acts.[45]

2. LEGISLATIVE POLICY FOR THE FUNCTIONING OF THE DEMOCRACY (ENSURING INNER PARTY DEMOCRACY)

It is to be noted, that ensuring inner democracy in political parties is of primary importance. This conclusion is direct assumption from the discussion above. To be more precise, ensuring participation of population is the precondition of existence of political party as an institute. This idea is the source of its legitimation that considers political party as the indivisible element of democratic functioning.[46] There is no unified definition of the notion of inner party democracy.[47] Two basic principles can be defined concerning inner functioning of political parties: autonomy and inner democracy. According to the first notion, autonomy of the association should be applied towards

43 Yigal Mersel, *Hans Kelsen and Political Parties,* 39 Isr. L. Rev. 158, 166 (2006).

44 Hans Kelsen, On the Essence and Value of Democracy, Weimar: a Jurisprudence of Crisis, Eds. Arthur J. Jacobson & Bernhard Schlink, 96-97 (2000).

45 Giorgi Kverenchkhiladze, Freedom of Political Association according to Georgian Legislation and European Convention on Human Rights, Protection of Election Rights and Freedom of Political Association in the Constitutional Court, Tbilisi, 33 (2006).

46 For some scholars principle of inner party democracy is a panacea, however, this issue is extremely actual as it is perceived as the way of neutralizing social and governmental crisis. See, Hanna Suchocka, Venice Commission Standards in the Field of the Establishment of Political Parties, Political Parties – Key Factors in Political Development of Democratic Societies, Publication of Presentations, 24 (2013); see also Susan Scarrow, Implementing Intra-Party Democracy, Political Parties and Democracy in Theoretical and Practical Perspectives, National Democratic Institute for International Affairs, 3 (2005); William P. Cross & Richard S. Katz, The Challenges of Intra-Party Democracy, Oxford University Press, 1 (2013) https://www.ndi.org/files/1951_polpart_scarrow_110105.pdf (last visited on 28.05.2016).

47 See William P. Cross & Richard S. Katz, The Challenges of Intra-Party Democracy, Oxford University Press, 2-3 (2013).

internal and external functioning of political parties. Broadly speaking, an association should have a possibility to define rules for selecting candidates and leadership.[48] The second central principle is the element of inner democracy, meaning implementation of democratic requirements in an organization.[49] According to the Venice Commission, putting minimal frameworks on political activities and system is the most effective way, however:

"As parties contribute to the expression of political opinion and are instruments for the presentation of candidates in elections, some regulation of internal party activities can be considered necessary to ensure the proper functioning of a democratic society."[50]

Thus, it is essential to ensure that individuals have a possibility to affect politics in order to let political parties function as guarantors of substantial and technical democracy. However, it is problematic that when *ad extra* actions of political parties may be in accordance with democratic principles and the rule of law and the lack of such approach in *ad intra* functioning is obvious.[51] Hence, an inner democratic system is crucial in order to guarantee participation.[52] Empowering inner party democracy ensures high quality of deliberation and supports strengthening of the democratic culture in general.[53]

Prescribing relevant legislative obligations, to ensure the functioning of inner democracy in political parties, is interference in protected sphere of basic rights, however, its proportionality may be a matter of discussion. Choosing candidates can be one of the vivid examples. Selection of candidates is an important challenge firstly for states and secondly for political parties. Candidates are listed mainly behind closed doors. The need of creating transparent and clear criteria are in an agenda. This excludes a decisive role of the political elite in the process of electing candidates. Hence, it ensures dysfunction of "closed door party system".[54]

48 CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 3.

49 Ibid.

50 CDL-AD(2010)024, Guidelines on Political Party Regulation, adopted by the Venice Commission, Venice, 15-16 October 2010, 25.

51 CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 5; according to the doctrinal considerations, nonexistence of inner party democracy, may become ground for its abolition. See Yigal Mersel, *The Dissolution of Political Parties: the Problem of Internal Democracy,* 4 Int'l J. Const. L. 84 (2006).

52 Yigal Mersel, *Hans Kelsen and Political Parties*, 39 Isr. L. Rev. 158, 172 (2006).

53 Susan Scarrow, Implementing Intra-Party Democracy, Political Parties and Democracy in Theoretical and Practical Perspectives, National Democratic Institute for International Affairs, 3 (2005) https://www.ndi.org/files/1951_polpart_scarrow_110105.pdf (last visited on 28.05.2016).

54 Irakli Kobakhidze, Law of Political Associations, Tbilisi, 89 (2008).

Following this path hardly any detailed regulation is prescribed in political parties' or election law. Mostly legislator points at general principles. An example of detailed regulation can be German law on political parties,[55] likewise organic law of Portugal on political parties.[56] The Venice Commission includes Latin-American countries in the list of those countries, however, in the recent case, absence of strong inner party democratic structure is considered as motivation for providing regulation on inner democracy, and this may not be timely for European cases.[57]

Legislative regulations emphasize elective bodies and their rights in the process of candidate nomination. According to the Article 21, Federal Elections Act of Germany[58] prescribes dual possibility for election of the candidates: (1) by members' assembly and (2) by delegates' assembly.[59] Demands become more detailed in regard to electing actors. According to the current regulation, members of the assembly can be the party members who are voters of their district at the time of the meeting (article 21.1). In the district itself, requirements for admissibility of the candidate are as follows: being member of only corresponding party and being elected at a party congress (or at a special or general delegates' assembly) held specificity only for electing constituency candidates (article 21.1.). Above mentioned regulations are binding for Bundestag election. As the delegate assembly elects candidates indirectly, legislation prescribes detailed rules concerning delegates' assembly. For instance, according to article 21 paragraph 3 of the same act indicates delegates are elected by secret ballot. Apart from this, any member, attending the meeting is entitled to present themselves and their programs. German mechanism pays attention to the matter of time limits and points out that elections should not be held earlier than 32 months from the time of Bundestag legislative term beginning, and delegate elections itself not earlier than 29 months. This rule does not apply to the case when the term of the Bundestag is terminated (article 21.3). Interestingly, executive committee can nullify the decision of the delegates' assembly (article 21.4).

Charter of the political parties applies to other procedural issues. However, law on elections of Finland obliges political party, in case it has no similar regulation in political party statute, to held

[55] Article 17 (24 July 1697). see http://www.bundestag.de/blueprint/servlet/blob/189734/2f4532b00e4071444a62f360416cac77/politicalparties-data.pdf (last visited on 28.05.2016).

[56] Article 33 (2/2003). CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 8.

[57] CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 8.

[58] https://www.bundeswahlleiter.de/en/bundestagswahlen/downloads/rechtsgrundlagen/bundeswahlgesetz_engl.pdf (last visited on 28.05.2016).

[59] Same regulation is prescribed in the organic law on political parties of Spain (6/2002) Article 7.

election procedure of the candidate in accordance with regulations prescribed by law.[60] According to Finish legislation, decision in regard to appointing candidates should be delivered by local organization (article 116). Similar regulation to the German one can be found in this law as well, setting forth "right of change" (article 117). According to it, management of the party (board) can recommend changes to the selected candidates, however presented list should not differ from the original with the proportion of one-fourth and it should contain more than a half of the original list as well.

One more example can be presented, the law on elections of Chile obliges political parties to hold primary elections for nominating president, members of parliament and mayors candidates.[61]

Evaluation of inner party democracy is mostly defined how decentralized the activity of the party is in regard to candidates selection. If its quality is high, then approach that candidate nomination issues is the discretion of the parties seems less problematic. However, the Venice Commission points on the adverse issues of "quite centralization" in regards to political parties in Central and Eastern European countries.[62]

2.1. General Methodology

Influence of international standards and regulations is an important issue in defining law on political parties.[63] There are specific areas, with detailed and common approaches. However, one can less likely consider one accepted approach on the matter of inner organization of political parties. Some states specifically indicate the need of accepting principles ensuring inner party democracy (ex. Germany, Spain) but mostly, this is not the case.

The Venice Commission in the Guidelines on Political Parties Regulation discusses nondiscrimination and equality in inner functioning of the party.[64] According to their point of view, for providing de facto equality of women and ethnic minorities, introducing relevant regulation is a good prac-

60 Article 113 Election Act of Finland (714/1998) http://www.finlex.fi/en/laki/kaannokset/1998/en19980714.pdf (last visited on 28.05.2016).

61 CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 9.

62 CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 10.

63 Anika Gauja, *The Legal Regulation of Political Parties: Is There a Global Normative Standard?*, 15 Election L.J. 1 (2015).

64 CDL-AD(2010)024, Guidelines on Political Party Regulation, adopted by the Venice Commission, Venice, 15-16 October 2010, 18.

tice. According to its evaluation, this represents a relevant compensation for the historic inequality.[65] From the legal perspective, problem mostly depends on the electoral systems[66] and inner party democracy.[67]

Taking into consideration crucial role of the political party, several states of OSCE created legislation that in its essence, ensures inner democracy in functioning of the party.[68] Good practice in this sense means transparent decision-making process in political parties, especially in regard to the nomination of candidates.[69] Parliamentary Assembly of the Council of Europe called on member states to introduce regulations that „will encourage implementation of inner party democracy".[70]

From the list of similar issues, gender quotas have been actual recently in Georgia. Its goal is to ensure balanced representation in political and public decision-making process.[71]

2.2. Gender Equality

Elections are the most important tool for the citizen's political participation. From this point of view, legislator intensively interferes in the protected sphere of political parties. Interference in basic rights is justified if it occurs in the case of closed voting lists.[72] The most common type of interference is establishing gender-based quotas. "Hindering normal functioning of democratic processes" is the ground for interference in the basic right of freedom of association.[73] From one point of view, issue of gender quota is understandable; however, there are many social-economic factors for the passivity of women (even in the case of rather open society).

Gender quotas are actively discussed in different states, as it is one of the most trending issues nowadays. In this sense, constitutional courts act as important actors. According to the decision

65 Ibid.
66 See CDL-AD(2009)029, Report on the Impact of Electoral Systems on Women's Representation in Politics, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 12-13 June 2009.
67 See CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015.
68 CDL-AD(2010)024, Guidelines on Political Party Regulation, adopted by the Venice Commission, Venice, 15-16 October 2010, 25.
69 Ibid.
70 William P. Cross & Richard S. Katz, The Challenges of Intra-Party Democracy, Oxford University Press, 1 (2013).
71 Recommendation Rec(2003)3 of the Committee of Ministers to member states on Balanced Participation of Women and Men in Political and Public Decision Making, 12 March 2003; Explanatory Memorandum, I C, 13.
72 CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 11.
73 CDL-AD(2010)024, Guidelines on Political Party Regulation, adopted by the Venice Commission, Venice, 15-16 October 2010, 25.

of the constitutional court of Italy 12 December 1995, #422 gender quotas are considered as anti-constitutional.[74] However, in 2003, decision #49 of same constitutional court, demonstrated gender quotas as corresponding to the constitution based on an amendment of Article 117, Constitution of Italy, 2001.[75] The latter concerned regional representative bodies and referred to the state's obligation of providing equal opportunities. During the same year, another amendment was introduced in Constitution adding the following phrase to the Article 51 – state is authorized to take special measures to ensure equal opportunities for males and females.

In 2008, Court of Spain discussed matter of gender quotas as well.[76] According to the appealed legislation, political parties were obliged to present balanced election lists, where each gender would have been represented not less than 40%. According to appellants' arguments, regulations setting forth such advantages cause violation of the following constitutional principles and rights: the principle of unity of population, right of equality (Constitution of Spain, Articles 14 and 23), right to participate in public life (Constitution of Spain, Articles 23 and 68 paragraph 5), right to political association (Constitution of Spain, Articles 6 and 22) in context of having possibility to form political will in frames of specific ideology (Constitution of Spain, Articles 16 and 20.1a).[77] Constitutional Court deemed this regulation to be constitutional. Main argument of the court was based on the right of equality. Court differentiated between formal and material equality. Constitutional reflection of material equality for constitutional court was Article 9 paragraph 2, Constitution of Spain, which obliges government to provide conditions that would make enjoyment of basic rights "real" and "effective". From the constitutional courts perspective, this approach is not discriminatory as this division is not based on /majority/minority criteria (for instance as it would have been in case of considering race or age as criteria).[78] For the court, political parties' freedom is not absolute and gender quotas are precondition of the scale, such as the obligation of presenting closed election lists or any other criterion for admissibility.[79]

The Venice Commission elaborates on positive effects of creating structural divisions inside political parties ensuring gender balance. However, it also points out that it may have a negative

74 Maria Grazia Rodomonte, *Equal Access to Elective Offices: A Challenge for Italian Democracy*, J. Pol. Sci. Pub. Aff. (2013) http://dx.doi.org/10.4172/2332-0761.1000107 (last visited on 28.05.2016).

75 Ibid 2.

76 See decision N12, January 29. http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC122008en.aspx (last visited on 28.05.2016).

77 See Decision N12, January 29, 3rd part. http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC122008en.aspx (last visited on 28.05.2016).

78 Ibid. 5th part.

79 CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 13.

effect in terms of marginalization and alienation of women inside the party.[80] According to its recommendation, if the party violates legislative provisions on quota, corresponding sanctions should be prescribed.[81] Sanctions may be financial or in extreme cases, removal of the party from the election processes may be applied. Thus, a sanction should be proportionate to the violation.

2.3. Ensuring Participation of National Minorities

Constitutional heritage and realization of fundamental principles of Europe ensure the protection of ethnic minorities. This issue is discussed not only on the academic level, but it is a matter of public discussions as well (political debates).[82] A possibility of participation in political decision-making process is a tool for conflict prevention.[83] However, there is no legal obligation throughout Europe that would guarantee representation of minorities. According to the Venice Commission, representation should be stimulated mostly in the states where forming the party based on ethnic of regional grounds is prohibited.[84]

If legislator's goal is to ensure participation of minorities in decision making, it should be taken into account that if borders of election districts are similar to the living territories of minorities, then ensuring their representation is more likable. Moreover, potential of success of open or free lists in regard to ethnic minorities should be evaluated individually in every case.[85] Generally, the general principle of equality ensures participation of minorities.

Different policy exists concerning national minorities. Part of the states (a) directly provide their representation, when (b) the other part, establish different supporting mechanisms. (a) For instance in Croatia, places for minorities are reserved in the parliament.[86] One place is defined for Italian and Hungarian minorities in Slovenia.[87] Special approach is created by Article 62 paragraph 2,

80 CDL-AD(2010)024, Guidelines on Political Party Regulation, adopted by the Venice Commission, Venice, 15-16 October 2010, 25.
81 Ibid, 31.
82 CDL-INF(2000)4, Electoral Law and National Minorities, adopted by the Venice Commission, Strasbourg, 25 January 2000, 2.
83 Ibid.
84 CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 15.
85 CDL-INF(2000)4, Electoral Law and National Minorities, adopted by the Venice Commission, Strasbourg, 25 January 2000, 8.
86 The Constitutional Act on the Rights of National Minorities in the Republic of Croatia the Croatian Parliament, ∂. 19 (2002) http://www.regione.taa.it/biblioteca/minoranze/croazia2.pdf (last access date 28.05.2016).
87 CDL-INF(2000)4, Electoral Law and National Minorities, adopted by the Venice Commission, Strasbourg, 25 January 2000, 3.

Constitution of Romania, by setting forth that if representative of national minority organisation will not be able to obtain place in the parliament, then each of them will have one mandate, however, only one union can represent corresponding minority. Law on elections prescribe the details: if in any chamber, representative of national minority organisation will not be able to obtain mandate and its received votes are equal to 10 percent of the average number of votes needed to be elected as a member, the party will be granted with mandate anyways.[88] (b) Similarly, election barriers are lowered for national minority associations in Germany, Denmark and Poland.[89]

2.4. Political Parties and Freedom of Association – Borders Set by Goals.

Restriction of freedom of association considerably depends on constitutional record. Three different approaches can be distinguished: (1) inner democracy principle is pointed out in the Constitution; (2) there is no indication on political parties; (3) freedom of association of political parties is mentioned.[90] In the latter case, test of proportionality is the strictest, when in the first two cases intensity is reduced.

Ensuring inner democracy by the political party might be considered as their obligation (inner democracy is "explicit goal" for political parties[91]). Unfortunately and frequently they are not bonded with this responsibility.[92] For providing inner democracy, issue of advisability of intensity of interference in the protected sphere of basic rights should be ascertained. While setting forth specific regulations, quantitative characteristics should be evaluated. To be more precise, it should be assessed what is the current capacity and what the maximum result can be achieved by setting potential regulation in motion.

According to one position, approach that democracy is not sum of democratic elements does not lose its actuality[93], and political parties should be understood as "group of politicians" and not as the union of citizens.[94] The fact, that policy or ideology received as the result of procedural or sub-

88 Law on the Elections for the Chamber of Deputies and the Senate, articles: 4.2. and 93.1.j) (2004) http://www.lexadin.nl/wlg/legis/nofr/eur/lxwerom.htm (last visited on 28.05.2016).

89 CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 16.

90 CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 6.

91 CDL-AD(2009)002, Code of Good Practice in the Field of Political Parties, adopted by the Venice Commission, Venice, 12-13 December 2008, 2.

92 William P. Cross & Richard S. Katz, The Challenges of Intra-Party Democracy, Oxford University Press, 1 (2013).

93 Giovanni Sartori, Democratic Theory, New York, 124 (1965).

94 William P. Cross & Richard S. Katz, The Challenges of Intra-Party Democracy, Oxford University Press, 5 (2013).

stantial democracy may not be widely acceptable by voters, is the real threat for the supporters of this idea.[95] This latter argument is strengthened with the empirical data, interest towards political parties is reducing, resulting in less representative decision making party society.[96] Apart from this, centralization quality of the actions of the party is so high, that political parties and state come closer, which results in undermining democratic process and pluralism.

According to the second position, external interference is justified if the goal is to restrict authority of non-accountable leadership[97] or exclude anti-democratic policy/plans[98] or for the protection of democracy[99] substantially as well as procedurally. Maximum involvement of citizens is legitimate goal and at the same time main factor that makes political party social-politically relevant. At the same time, involvement is necessary not only in terms of ideological or theoretical-philosophical perspective, but from the practical point of view as well. High chances of being representative of self or social interests raises society and gives the best result to the deserved ones.

CONCLUSION

Corresponding to recent tendencies, inner organizational procedures of political parties have become a subject of external regulation.[100] As empirical normative research has shown, legislative regulation of inner activities of political parties is an important characteristic of laws on political parties or elections in different countries. Thus, the preference of the legislator in favor of the parties that act according to the democratic principles is vivid. However, at the same time, making this decision is connected to the crucial legal dilemma and, on the other hand there is a matter of protection of the basic right of the freedom of association of political party. By analyzing the doctrine, it is also revealed the definition of political party is comprehended differently that puts forward new features in the process of finding balance by the legislator.

95 Ingrid van Biezen & Daniela Romée Piccio, Shaping Intra-Party Democracy: On the Legal Regulation of Internal Party Organizations, The Challenges of Intra-Party Democracy, Eds. William P. Cross & Richard S. Katz, 46 (2013).

96 Ingrid Van Biezen, *Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe*, 42 Br. J. Political Sci. 187, 205 (2012).

97 James A. Gardner, *Can Party Politics Be Virtuous?,* 100 Colum. L. Rev. 667 (2000).

98 Ingrid van Biezen & Daniela Romée Piccio, Shaping Intra-Party Democracy: On the Legal Regulation of Internal Party Organizations, The Challenges of Intra-Party Democracy, Eds. William P. Cross & Richard S. Katz, 45 (2013).

99 Ingrid van Biezen & Gabriela Borz, *Models of Party Democracy: Patterns of Party Regulation in Post-War European Constitutions*, 4 Eur. Polit. Sci. Rev. 327-359 (2012).

100 See Ingrid van Biezen & Daniela Romée Piccio, Shaping Intra-Party Democracy: On the Legal Regulation of Internal Party Organizations, The Challenges of Intra-Party Democracy, Eds. William P. Cross &Richard S. Katz, 27-48 (2013).

It is to be noted, that skeptical attitude towards political parties is an actual issue for sustained democracies as well as for other systems.[101] The challenge for the legislative policy is to create such regulations that will enhance a trust to a political party, which is linked to the legitimacy of democracy. The same approach also means that society has a possibility of political alternatives. Meaning that, there is the potentiality not only to create new (in this case establishing political party), but also a chance to correct existing ones, participating in it fully (revision can be in persons or ideas (in the framework of corresponding political ideology)). Thus, a component of participation using political parties should not exist as a general right, but it should exist on the goal-oriented policy/mechanisms level. On the other side, all the above mentioned is complex and non-independent issue. Several outlined matter should be pointed out once again – challenges are individual and intensity of certain directions of legislative policy should be defined not only in proportion to the reality but future and result as well. In itself, public participation crisis cannot be solved by, this approach but it will make a big contribution in terms of functioning of democracy. It is crucial that in different cases, changes of political climate is not a reaction of an elite but rather a social effect.

[101] Juan J. Linz, Parties in Contemporary Democracies: Problems and Paradoxes, Eds. Richard Gunther, José Ramón Montero, and Juan J. Linz, Political Parties: Old Concepts and New Challenges, Oxford University Press, 291, 294-308 (2002).

BIBLIOGRAPHY

1. Giorgi Kverenchkhiladze, Freedom of Political Association according to Georgian Legislation and European Convention on Human Rights, Protection of Election Rights and Freedom of Political Association in the Constitutional Court, Tbilisi (2006)
2. Irakli Kobakhidze, Law of Political Associations, Tbilisi (2008)
3. Anika Gauja, *The Legal Regulation of Political Parties: Is There a Global Normative Standard?*, 15 Election L.J. 1 (2015)
4. Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 JPE 135 (April, 1957)
5. Bruce D. Graham, Representation and Party Politics, Ed. Gillian Peele, Oxford (1993)
6. CDL-AD(2009)002, Code of Good Practice in the Field of Political Parties, adopted by the Venice Commission, Venice, 12-13 December 2008
7. CDL-AD(2009)029, Report on the Impact of Electoral Systems on Women's Representation in Politics, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 12-13 June 2009
8. CDL-AD(2010)024, Guidelines on Political Party Regulation, adopted by the Venice Commission, Venice, 15-16 October 2010
9. CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015
10. CDL-INF(2000)4, Electoral Law and National Minorities, adopted by the Venice Commission, Strasbourg, 25 January 2000
11. Cindy Skach, Political Parties and the Constitution, Oxford Handbook of Comparative Constitutional Law, Eds. Michel Rosenfeld & Andras Sajo (2012)
12. Drude Dahlerup & Lenita Freidenvall, Electoral Gender Quota Systems and Their Implementation in Europe, European Parliament, Directorate-General for Internal Policies, Policy Department, Citizens' Rights and Constitutional Affairs (2008)
13. Fernando Casal-Bértoa, Daniela Romée Piccio & Ekaterina R. Rashkova, *Party Law in Comparative Perspective*, Economic and Social Research Council & European Research Council, Working Paper 16 (March 2012)
14. Giovanni Sartori, Democratic Theory, New York (1965)
15. Giovanni Sartori, *Parties and Party Systems: a Framework for Analysis* ,17 Public Policy 261 (1966)
16. Gregory Fox & Georg Nolte, Intolerant Democracies, Democratic Governance and International Law, Eds. Gregory Fox & Brad R. Roth (2000)
17. Hanna Suchocka, Venice Commission Standards in the Field of the Establishment of Political Parties, Political Parties – Key Factors in Political Development of Democratic Societies, Publication of Presentations (2013)
18. Hans Kelsen, On the Essence and Value of Democracy, Weimar: a Jurisprudence of Crisis, Eds. Arthur J. Jacobson & Bernhard Schlink (2000)
19. Ingrid van Biezen & Daniela Romée Piccio, Shaping Intra-Party Democracy: On the Legal Regulation of Internal Party Organizations, The Challenges of Intra-Party Democracy, Eds. William P. Cross & Richard S. Katz (2013)
20. Ingrid van Biezen & Gabriela Borz, *Models of Party Democracy: Patterns of Party Regulation in Post-War European Constitutions*, 4 Eur. Polit. Sci. Rev. 327 (2012)
21. Ingrid Van Biezen, *Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Postwar Europe*, 42 Br. J. Political Sci. 187 (2012)
22. James A. Gardner, *Can Party Politics Be Virtuous?,* 100 Colum. L. Rev. 667 (2000)
23. John Stuart Mill, Considerations on Representative Government, Essays on Politics and Society, Ed. John M. Robson http://oll.libertyfund.org/titles/234 (last visited on 28.05.2016)
24. Jonathan R. Macey, *The Role of the Democratic and Republican Parties as Organizers of Shadow Interest Groups*, 89 Mich. L. Rev. 1 (1990)

25. Juan J. Linz, Parties in Contemporary Democracies: Problems and Paradoxes, Political Parties: Old Concepts and New Challenges, Eds. Richard Gunther, José Ramón Montero & Juan J. Linz, Oxford University Press (2002)
26. Kaare Strom, *A Behavioral Theory of Competitive Political Parties*, 34 Am. Polit. Sci. Rev. 565 (1990)
27. Kenneth Janda, Adopting Party Law, Political Parties and Democracy in Theoretical and Practical Perspectives, National Democratic Institute for International Affairs (2005)
28. Maria Grazia Rodomonte, *Equal Access to Elective Offices: A Challenge for Italian Democracy*, J. Pol. Sci. Pub. Aff. (2013) http://dx.doi.org/10.4172/2332-0761.1000107 (last visited on 28.05.2016)
29. Moisei Ostrogorski, Democracy and the Organization of Political Parties (1902) https://archive.org/details/democracyandtheo031734mbp (last visited on 28.05.2016)
30. Pippa Norris, Building Political Parties: Reforming Legal Regulations and Internal Rules, Report commissioned by International IDEA (2004)
31. Richard H. Pidles, Elections, Oxford Handbook of Comparative Constitutional Law, Eds. Michel Rosenfeld & Andras Sajo (2012)
32. Susan Scarrow, Implementing Intra-Party Democracy, Political Parties and Democracy in Theoretical and Practical Perspectives, National Democratic Institute for International Affairs (2005) https://www.ndi.org/files/1951_polpart_scarrow_110105.pdf (last visited on 28.05.2016)
33. Thomas Carothers, Aiding Democracy Abroad: The Learning Curve, Carnegie Endowment for International Peace, Washington D.C. (1999)
34. Thomas Saalfeld & Kaare W. Strøm, Political Parties and Legislators, the Oxford Handbook of Legislative Studies, Eds. Shane Martin, Thomas Saalfeld & Kaare W. Strøm (2014)
35. Walter Bagehot, The English Constitution (1873)
36. William P. Cross & Richard S. Katz, The Challenges of Intra-Party Democracy, Oxford University Press (2013)
37. Yigal Mersel, *Hans Kelsen and Political Parties*, 39 Isr. L. Rev. 158 (2006)
38. Yigal Mersel, *The Dissolution of Political Parties: the Problem of Internal Democracy,* 4 Int'l J. Const. L. 84 (2006)

GIORGI MELADZE
Ilia State University Associate Professor.

GIORGI MUMLADZE
Ilia State University Researcher.

CONSTITUTIONAL AGREEMENT: HISTORY, PUBLIC DISCUSSIONS AND IMPACT ON THE PROTECTION OF THE RIGHTS OF MINORITIES IN GEORGIA

ABSTRACT

Relationship between the state and the church is one of the central issues in a history of law reform in terms of the protection of human rights as well as approximation of Georgia with western institutions. There are many questions related to the insurance of equal treatment of different churches by the state. There are a number of examples of unequal treatment as well as laws, which institutionalize the practice of inequality. Constitutional Agreement between the state of Georgia and the Autocephalous Orthodox Church of Georgia signed in 2002 and its role in the formation of legislative frames is key and therefore also at the center of discussion.

Our article aims to describe, based on the analyses of legislation, court practice and public discussions, what expectations existed with respect to the Agreement prior to its adoption and what legislative impact the Agreement between the state and the Orthodox Church had on the rights of minorities.

1. INTRODUCTION

Protection of freedom of religion has become a serious challenge for Post-Soviet Georgia. Civil confrontation, occupation, security problems, economic crises – all of these created a fertile ground for violence and search for "stranger", "enemy". After Soviet dictatorship, religious

groups, previously "without voice", soon appeared in the public space. By the end of 90s, Georgia became an arena of confrontation and religious extremism[1]. During the persecution of religious minorities the state played the role of either instigator or merely an observer.

In parallel to the persecution, the state significantly limited the legal status of religious minorities[2]. The said processes is documented and described in detail in a number of human rights reports and surveys[3].

In response to the repressive policy, civil society groups were trying to exercise the initiatives of freedom of religion considering the western experience. This tendency was justified if we consider that western orientation was openly declared to be a priority for the Post-Soviet, new Georgian democracy from its very first days of independence[4].

Sharing the Western experiences was also supported by the influence of international mechanisms such as Council of Europe, European Court of Human Rights, International Religious Freedom Act[5], etc. These instruments are of great importance and establish a strong legal and political ground for the protection of religious freedom.

Speaking about the protection of the rights of religious minorities does not loose relevanse until nowadays. The problem of equal rights, special privileges granted to the Orthodox Church remains one of the issues of discussion between lawyers, political scientists and sociologists. Public debate about the relationship between the state and the church is rather painful, and unfortunately, is not accompanied by a comprehensive academic literature. Relevance of this debate has increased by the claim submitted to the Constitutional Court demanding establishment of an equal tax regime for all religious organizations. The present work aims to analyze an existing legal

1 Report of the Liberty Institute – "Human Rights Review" 2002-2003.

2 Giorgi Meladze, Giorgi Noniashvili – Religious Organizations in Georgian Legislation, Constitutional Law Review, 2016.

3 1) U.S. DEPARTMENT of STATE – country reports on human rights practice: http://www.state.gov/j/drl/rls/hrrpt/1999/330.htm; http://www.state.gov/j/drl/rls/hrrpt/2000/eur/760.htm; http://www.state.gov/j/drl/rls/hrrpt/2001/eur/8256.htm; http://www.state.gov/j/drl/rls/hrrpt/2002/18366.htm; http://www.state.gov/j/drl/rls/hrrpt/2003/27838.htm; http://www.state.gov/j/drl/rls/hrrpt/2004/41682.htm;
2) Reports of the Liberty Institute – "Human Rights Review", 2002-2003
3) Keston Institute - http://www.keston.org.uk/kns/2002/knsindex.shtml; http://www.keston.org.uk/kns/2001/knsindex.shtml;

4 Tarkhan-Mouravi Gia, Georgia's European Aspirations and the Eastern Partnership, pg. 52, from The Making of Modern Georgia, 1918-2012: The First Georgian Republic and Its successors, Jones F Stephen (Ed.) 2014, New York.

5 International religious freedom act adopted 1998.

relationship between the state and the Orthodox Church and investigate its legal effect on other religious organizations in Georgia. By doing this, we will try to continue the debate, bring together the main arguments and present our vision about the Constitutional Agreement with respect to the legislation.

2. PRIVILEGED STATUS OF THE CHURCH AND INTERNATIONAL STANDARDS OF HUMAN RIGHTS

In political science it is popular to classify the relationship between the state and the church according the criteria such as: intensity of intervention by the states and quality of autonomy, quality of the protection of religious freedom, ease of allowance of religious expression in the public space, etc. Different authors offer different models of classification, though, in all such system, we can find the form of the relationship between the state and church when the state distinguishes one of the religious organizations and empowers it with the special privileges. Such regimes are named differently by authors. In our Article we will use two terms: established church and state church – as the concepts to describe a close relationship between the state and the church, when the state creates a privileged legal status for only one, in our case, for Autocephalous Orthodox Church of Georgia.

In spite of the fact, that the "Papacy Wars" in Western Europe and "Symphony" model of Byzantium offers different modes of relationship between the state and church, in both traditions we can observe an attempt to gain privileged status from the state. Today, it becomes increasingly difficult to compare experience of the relationship between the state and the church in Europe with any previous period. The modern processes are directed to equalize the legal status of communities and churches with different religious views though we still face existence of social privileges which is often criticized. Completely new direction of criticism is offered by Jeroen Temperman in his article "Are State Churches Contrary to International Law?", in which the author argues that up to 40 states which offer a variety of special privileges to one of the church in any form, at the same time restrict the rights of minorities. Therefore privileged regimes are contrary to international human rights standards. His argument continues the reasoning of Nussbaum and Brugger, that any form of promotion of any church necessarily effects on the public policy[6] and creates an internal pressure on the society, some kind of fear "not to become isolated from the society", which forces actors, including the state, to identify themselves with the privileged Church[7].

[6] Marta C. Nussbaum, Sex and Social Justice (oxford University Press, 2000), p. 103.

[7] Winfried Brugger, On the Relationship between Structural Norms and Constitutional Rights in Church-State Relations, in Winfried Brugger and Michael Karayanni (eds), Religion in the Public Sphere: A Comparative Analysis of German, American and International Law (Springer, 2007) p. 52.

Temperman offers an argument that granting privileged conditions to the church should be considered as proselytism which will be incompatible with the international instruments[8]. The author criticizes existing practice of relationship between state and church in European countries and substantiates that existence of even symbolic status, free from real privileges, is still dangerous for freedom of religion.

In spite of the fact, that institutional denominational favoritism[9] is gradually replaced by the process of disestablishment, Temperman argues, that existence of privileged status carries a discriminatory content and refers to the argument given in the Report of Special Reporter on Religious Freedom, that: "when the state gives a place to one of the religions in its constitution, the law terminates the protection of ethnical and religious diversity and opens the door to the flood of arbitrary and religiously motivated intolerance.[10]"

We will finish the review of the arguments with the main argument which runs as a red line through the whole discussion: "it is impossible to get rid of the negative effects of the state church. The debate that the state church might not violate the human rights standards loses its ground and remains only as a theoretical exercise of the mind.[11]"

Existence of a privileged status of the church is acknowledged by lawyers to be a dangerous condition for the religious freedom. The problem of equality is addressed in the report on religious freedom produced by the OSCE. The process to eliminate dfferences called disestablishment is gaining momentum in the Nordic countries and the United Kingdom, an aim of which is a gradual removal of the traditional privileges and creation of an equal environment for churches. With this regard, Georgia has also made significant reforms and introduced a liberal registration regime offering an equal legal status to all the church[12].

Despite this reform, issue of privileged conditions of the Autocephalous Orthodox Church of Georgia remains relevant in the legislative system as well as administration of public policy. Activists and speakers on this issue often refer to the Concordat as a determining factor of a privileged

8 Jeroen Temperman, Are State Churches Contrary to International Law?, Oxford Journal of Law and Religion, Vol 2, N1 (2013) p. 130.

9 Johan D van der Vyver, The relationship of Freedom of Religion or Belief Norms to other Human Rights, in Tore Lindholm and others (eds), Facilitating Freedom fo Religion or Belief: A Deskbook (Martinus Nijhoff Publishers, 2004) 85, 105-06.

10 Report of the Special Rapporteur on freedom of religion and belief, A/HRC/10/60 (2011) p. 18.

11 See note 11, p. 143.

12 Giorgi Meladze, Giorgi Noniashvili – Religious Organizations in Georgian legislation, Constitutional Law Review, 2016.

status. This opinion is arguable as this church had a "special status" during and after the Soviet Union, before adoption of the Concordat. Example for this is a property granted by the state free of charge as well as factual immunity to the violent groups associated with the church during the religious "pogroms" in 1997-2002. Despite this, the Concordat has a great importance in terms of institutionalization of the relationship between the state and the church in the legislative system of the state.

3. PREHISTORY OF THE ADOPTION OF THE CONCORDAT AND ARGUMENTS IN GEORGIA

The debate about the legal regulation of the relationship between the state and the church started in the first years of independence. The model offered by the interest groups at the first stage about the adoption of a special law on religion went to first hearing in parliament and after publication in the official newspaper "Republic of Georgia" disappeared from the agenda and was lost in the archives[13].

Despite this, work was still continued in small groups and was given a new energy by the idea of granting a high status to the Autocephalous Orthodox Church of Georgia and signing a Constitutional Agreement by the end of 90s.

Print Media Review gives us a good impression about the opinions stated on the constitutional agreement. Politicians, scientists, civil activists, priests and journalists equally engaged in the public discussion and a number of arguments were expressed in favor or against the constitutional agreement.

Part of the arguments were legalistic. In particular: what kind of legal instrument the contract is? Whether or not it is in compliance with the spirit of the Constitution? Is it contrary to the principles of international law?

The main argument of the opponents was an issue of granting a special status and leveling the church with the state. "The main thing that causes the protest about this project is that Autocephalous Orthodox Church of Georgia is one of the institutions in the society which... considers it as a super institution aimed at ensuring the wellbeing of the members of the given society and elevates it to the level equal to the state"[14], noted philosopher Zurab Tchiaberashvili in his letter published in 2000.

[13] The draft was published on June 5, 1994 in the Republic of Georgia.

[14] Philosopher Zurab Tchiaberashvili – "The State of Georgia and the Orthodox Stalinism" –January 29 – February 7, 2000, newspaper Europe N13.

Authors also underlined unconstitutional nature of the contract: "...under the Constitution Orthodoxy is declared as a special religion, which is non-democratic[15]" – however, there have been also opponents against this opinion. The Vice Speaker of the Parliament Gigi Tsereteli disagreed with the opinion, according to which the state and the church were becoming the organizations with an equal status: "in order for the state to sign a contract with the church, it is necessary to make an amendment to the constitution. However, signing the Constitutional Agreement does not mean the simultanous existence of two "states" in the country[16].

His position was shared by the Parliamentary Secretary of the President John Khetsuriani: "the most welcomed way for two independent subjects to come to an agreement is signing a contract. By this contract the Orthodoxy will not become privileged. This will be a reflection of the reality in a legal language"[17].

Negative positions were expressed by the priests of the Autocephalous Orthodox Church of Georgia as well, their statement read: "we hope that the public officials in the government will make a reasonable and fair decision and will refrain from signing constitutional agreement with the Patriarchate as under this contract the government violates its own constitution."[18]

Negative position was expressed by professor Shukia Apridonidze: "as we see, so called "constitutional agreement" with its content and expected results is nothing but unconstitutional, more "earthly" than a permissible deal. It should be stated clearly and without ambiguity that such "deal" not only does not mean anything, moreover – undermines the true consent in Georgia as it is contrary to the personal interests of every citizen as well as the whole country's national interests."[19]

Theologian Teimuraz Dedabrishvili expresses his opinion against the contract: "giving constitutional weight to the Agreement between the State and the Patriarchate means that it will take precedence over international agreements between two countries (also called "ordinal international agreements") in the legislative hierarchy. It appears that with the form of the constitutional agreement

[15] Professor Valeri Loria – "The Parliament Signs a Contract with the Church on March 15" – February 22, 2001, newspaper Resonance N 050 (2181).

[16] Vice Speaker of the Parliament Gigi Tsereteli – "The Parliament Signs a Contract with the Church on March 15" – February 22, 2001, newspaper Resonance N 050 (2181).

[17] Parliamentary Secretary of the President John Khetsuriani – "The Parliament Signs a Contract with the Church on March 15" – February 22, 2001, newspaper Resonance N 050 (2181).

[18] Protosingelos Archimandrite Ioane, Head of the church of St. Serapion Zarzmeli Archimandrite Giorgi; Priest Kirion; Hieromonk Angia; Hegumen Gabriel of the Monastery of St. Maksime Aghmsarebeli; Head of Tbilisi church of Assumption of Marry Priest Gelasi; Priest Zurabi; Deacon Alexsandre; Head of Kutaisi church of St. Nikoloz David "The State Should not Sign an Agreement with the Patriarchate" March 12, 2001– newspaper Resonance N 064 (2199).

[19] Professor Shuqia Apridonidze – newspaper Republic of Georgia as of march 14, 2001.

we face "extraordinary" unprecedented "international" agreement. As a modern state consists of three main components: government, territory and people (citizens) and the Patriarchate, including its members, is a part of the third component, it appears that part of this component is considered as an "international subject" by the state (!)... Organization consisting of its citizens living on its territory and controlled by it, turns out to be an "international subject" to him (and only to him) (!) while this subject is not even registered by the state yet. But nonregistered organization does not even exist for the state, is it?! (According to the article 1511 of the Civil Code of Georgia, religious organization, including the Patriarchate, which is not registered as a legal entity of public law until January 1, 1999, is revoked under the law). It turns out that the state considers the part of its own part, which is not even visible for it, as an "international subject" legally equal to itself (!)."[20]

Mikheil Naneishvili, member of the Liberal-democratic party, the Member of Parliament is in favor of this argument: "this constitutional agreement is a rough political mistake as it is unconstitutional... Under this agreement, the other sovereign body appears in the role of the state and this is called the state within the state".[21]

"Now we face an issue of how the relationship between the two independent subjects, the state and the church, should be regulated. It is known worldwide that an optimal way to determine the relationship between the independent subjects is a contract, according to which the contracting parties express their will and agree about the destiny of the relationship" – wrote John Khetsuriani. According to him, the risk caused by the contracts should have been balanced by the Constitutional Court.[22]

According to his opinion, practice of signing such contract should not apply to other churches and this precedent should remain as an exception: "Georgian Orthodoxy has a special historical significance and the state cannot sign the contract with other churches"[23] ...the author develops this opinion also in one of his interviews, where he points out that: "the said agreement between the state and the church is the last constitutional norm. This will be the last agreement related to the religious issues".[24]

[20] Teimuraz dedabrishvili "Post-communist Government and the Church are Sharing the Government!!!" – April 4, 2001 – the newspaper Resonance N 089 (2220).

[21] Liberal-democratic Party – Mikheil Naneishvili – May 16, 2001 newspaper Republic of Georgian N116.

[22] Doctor of law professor John Khetsuriani – "The State and the Church" February 27, 2001 newspaper Georgian Republic N47.

[23] The Parliamentary Secretary of the President John Khetsuriani – "The Parliament Signs a Contract with the Church on March 15" – February 22, 2001, newspaper Resonance N 050 (2181).

[24] President of the Constitutional Court of Georgia John Khetsuriani – October 10, 2002 newspaper Resonance N 276 (2761).

The Lutheran church was skeptical about the constitutional agreement, which was expressed in its letter addressed to the State Chancellery[25]. "The document itself is good and timely. We hope that determination of the status of the Orthodox Church will be beneficial for not only the Orthodox people but the whole nation. Despite this, existence of religious law is very important and we hope that the Orthodox Church and the state will take care of creating favorable conditions for us as well and enable us to grow"[26] – wrote the representative of the Catholic Church. However, despite skeptical attitudes, several churches: Catholic, Lutheran, Islamic, Jewish, Baptist and Armenian Orthodox churches expressed their support and signed memorandums of understanding with the Georgian Orthodox Church. The agreement was supported by up to thirty nongovernment organizations[27]. For those who supported, arguments were diverse, some would argue that similar contract needs to be elaborated with every church[28]. For part of the politicians adoption of the constitutional agreement became a part of their political program.[29]

The society's views also differed in terms of legal content of the Concordat. "I consider mistaken even the idea of the Concordat" – wrote Zurab Tchiaberashvili – "...when the Concordat was adopted in the European Countries between the state and the Catholic Church, it was an agreement between the specific state and the other state, in particular with Vatican. This happened because in the given state, Spain or France, the Catholic Church represented the Catholic Church of Rome. In our case, the Georgian Orthodox Church has an autocephaly. In other words, it is not a part of the Orthodox Church existing outside the territory of Georgia, but an independent institutional mechanism. Therefore, it turns out that Georgia as a state signs an agreement with the subject existing inside it and makes this subject equal to the state. Such practice does not exist in Europe as it is wrongly stated by the supporters of the Concordat.[30]

However, influential politician and Chairman of the Parliament of Georgia Zurab Zhvania was a fierce supporter of the contract: "today there does not exist a country which does not regulate its relationship with the traditional religion. The system of Concordat exist in many European

25 „Agreement between the State and the Church is Ready" – January 20, 2001 newspaper Resonance N 007 (2138).

26 Bishop of the Cathilic church Fr. Jouzepe Pazoto – October 19, 2002 newspaper Resonance N285 (2770)

27 Head of the interfractional group created for the preparation of the constitutional agreement between the state of Georgia and the Autocephalous Orthodox Church of Georgia Giogi Tsereteli, March 10, 2001 newspaper Republic of Georgian N 57.

28 Inteview with the representatvive of the Liberty Institute Levan Ramishvili.

29 Head of the Cristian-Conservative Party Shota Malashkhia – " Political Battles on Religious Issues" – October 5, 2002 newspaper Resonance N 271 (2756).

30 Philosopher Zurab Tchiaberashvili – "The Patriarchate Is Going to Sign an Agreement with Other Confessions" – January 24, 2001 neswpaper Resonance N 021 (2152).

countries, this is the case in the new European countries, and agreements are signed practically everywhere."[31]

Argument of Zhvania was not shared by the representatives of the university community: "when the logical question related to the analogy and precedents was asked, none of the examples were given. An agreement (or contract) signed by Mussolini on behalf of the state of Italy was named as a model event by the representative of the Patriarchate! (As far as I know, by this agreement the state declared the Catholicism as a state religion in fact) As they say, no comment." [32]

Supporters of the contract were trying to connect the idea of the contract to the determination of the constitutional status of the church. For them, the contact was a legislative tool that could be used to "establish" the state religion: "nowadays, in many countries the state religion is acknowledged in the constitution, including in countries well-known for us: the Great Britain, Denmark, Greece, etc. where the rule of law was established a long time ago and human rights are also sufficiently protracted[33]". Introducing an argument about the state religions showed once again that, there was a desire to grant the status of the state religion to the Georgian Orthodox Church using the contract.

Based on the review of the materials available in media, we can conclude that arguments of supporters of the contract were developed into two directions: Georgian Orthodox Church has a special role in the country and signing the contract would not cause violation of someone's rights.

Opponents' arguments were the following: signing the contract was already meant granting of special status, which created a discriminatory environment. The contract was legally and politically faulty instrument to regulate the relationship with the church; adoption of the agreement would cause a confrontation in the society. The following statement given by the Patriarch of the Orthodox Church might be considered as an example of a call for confrontation and conflict: "as you know, we have problems and the church also faces them. We believe that, thanks to god, we will be able to sufficiently address the sectarian proselytism and at the same time, contribute to the protection of the population in terms of moral"[34]. Therefore, it was clear that despite optimistic

31 Chairman of the Parliament Zurab Zhvania – "Extended Bureau Meeting of the Parliament on March 10" March 13, 2001 newspaper Republic of Georgian N 59.

32 Professor Shukia Apridonidze – March 14, 2001 newspaper Republic of Georgian N60.

33 Doctor of law professor John Khetsuriani – "The State and the Church" February 27, 2001 newspaper Republic of Georgian N47.

34 Catholicos-Patriarche of Georgia Ilia II – "The Idea Dreamed for Centuries Becomes a reality" October 16, 2002 newspaper Republic of Georgian N 251-252.

attitudes, voiced by political spectrum[35], the contract might become a new ground for confrontation in society.

4. ADOPTION OF THE CONSTITUTIONAL AGREEMENT AND ITS LEGAL ANALYSES

The debate about signing the contract between the state and the church was continued in the parliament. In 2000, at the autumn session, different projects were discussed in the fractions and committees, though the records of the proceedings where opinions expressed by the participant parties would be described in detail, have not been found in the Parliament's archive. Our review is based on the session discussion held on March 30, 2001 where results of the work were presented by the Head of Organizational Commission of the Public discussion and interfractional group, Member of the Parliament Gigi Tsereteli. The parliament made amendments to the constitution at this session, according to which articles 9 and 73 were amended. Previous version of article 9, which included only one paragraph and stipulated the following: „The State shall declare absolute freedom of belief and religion. At the same time, the State shall recognise the outstanding role of the Apostolic Autocephalous Orthodox Church of Georgia in the history of Georgia and its independence from the State". The second paragraph was added to the text, according to which: "relations between the State of Georgia and the Apostolic Autocephalous Orthodox Church of Georgia shall be governed by Constitutional Agreement. Constitutional Agreement shall be in full compliance with the universally recognised principles and norms of international law, specifically in terms of human rights and fundamental freedoms (30.03. 2001 N826)". Article 73 of the Constitution was added by the following paragraph: "b) conclude a constitutional agreement with the Apostolic Autocephalous Orthodox Church of Georgia on behalf of the State of Georgia;"

The speaker indicated that the ground for these changes was a historical significance of the church: "... the primary spiritual institute of our country, fighter for its independence, for its statehood, guardian of the nation's moral ..." most arguments were related to the analyses of the historical role of the church and as head of the working group he was referring, quoting the words of Ilia Chavchavadze that the church was: "a political cornerstone to gather, unite different parts of the country and indeed, unity of the faith meant the unity of the nation".

[35] President of Georgia Eduard Shevardnadze – The Idea Dreamed for Centuries Becomes a reality" October 16, 2002 newspaper Republic of Georgian N 251-252 "Today's victory, I do not afraid of this word, I believe, is indeed a moral and spiritual victory of our nation, his Holiness, and the President, which will contribute to the reunification of the country and unity of people and its cohesiveness."

The speaker lists different memorandums and contracts which were signed with nongovernment organizations and different churches about religious issues and based on which they supported the initiative of the contract. According to the presentation, initiated version of the contract consisted of 50 articles which was decreased to 24 articles by the time of constitutional amendments. Further discussions were planned to ensure the full protection of human rights and to ensure that religious freedom would not be restricted for any religious community.

The only position against the adoption of the Contract was expressed by the Member of the Parliament Mikheil Naneishvili who noted that copying European tradition into Georgian reality would not be relevant considering the existing legislative conditions. In his opinion, purpose of Concordats was to regulate the relationship between states, which initially put us before a false reality as Georgian Orthodox Church had not had any similar legal status. Therefore, it could not be the contracting party. His position was rejected by the absolute majority.

Discussions about the amendment to article 73 were brief. The Parliamentary Secretary of the President John Khetsuriani expressed his position and explained the reason why the full name of agreement was specified in article 73: "a 1) conclude a constitutional agreement with the Apostolic Autocephalous Orthodox Church of Georgia on behalf of the state of Georgia;". By this amendment, exclusivity of the agreements was underlined and the possibility for other religious communities to share this precedent was excluded. 180 Members of the Parliament participated in voting and all of them supported the constitutional amendments.

Parliamentary discussions were continued on October 22, 2002 when the issue related to the contract between the state and the church was considered at the plenary session. By this stage, the President had already signed the contract and the Parliament formally confirmed the conclusion of the contract by its resolution.

Majority of the arguments were repeated, though the Member of the Parliament Vakhtang Rcheulishvili added one more argument related to the maintenance of the state stability. He argued that considering the distrust of people toward the political institutes, the church remained the subject having the public's confidence and it could avoid civil confrontation. He also referred to the need for a peaceful transition of power, in the process of which the church had an important role and thanked to the Patriarch of Russia for the recovery of the relationship between Georgia and Russia.

Different opinions were expressed about article 6 of the agreement. For the part of speakers the article was dangerous, though the majority considered that the amendment should be read in the

context of international human rights. The members of the Parliaments also discussed the restitution of the church's property lost during the soviet occupation and Russian tsarism and referred to the high importance to perform this obligation (see. the summary remarks of Zurab Zhvania). Parliament finally approved the agreement with 203 votes. No one in the audience was against.

4.1 legal analysis of the constitutional agreement

The document consists of introduction, 12 articles and definitions of terms which includes 28 paragraphs. It is noted in the preamble that the Autocephalous Orthodox Church of Georgia is "an Apostolic See and is inseparable part of the World Orthodox Church", vast majority of Georgian population are Orthodox Christians, Orthodoxy has an exclusive role in the history of Georgia and it is represented by Catholicos-Patriarch of Georgia in the relationship with the state. Part of these provisions were criticized by the politicians[36] as well as some priests.

"...There are a number of religious groups called Orthodox , Christians doctrines of which contain contradictory contents about the principal issues. Modern democratic country should not want, cannot and neither has the right to determine, in this multitude, which religious community is a follower of a true Orthodox faith and which should be promoted (if, of course, it has such a desire). In this case, talking about several exceptions is impossible in principal as if the government choses only one from the religious communities and grants it privileges as an exception, it will turn out that the state does this arbitrarily, upon its personal interests, without prior investigation whether or not the favored religion is true.

When the state speaks about the religion of the Georgian nation – Orthodoxy, first of all, religious communities which follow the Orthodox religion should be determined. So the state should examine the religious doctrine of its favored religion and not only the title as nowadays several religious groups consider themselves as Orthodox.

"...According to the above mentioned, it would have been fair if the state had not interfered with the holy church and theological problems and had not taken a responsibility to determine who is and who is not Orthodox in Georgia. Especially, if it does not have a special state institution to determine this"... [37]

[36] Politician Irakli Tsereteli – "The Patriarcate Rejected Once Again the Christ and the Only Saving Religion – Orthodox Christianity" – March 9, 2001 newspaper Resonance N 064 (2194).

[37] Protosingelos Archimandrite Ioane, head of the church of st. Serapion Zarzmeli Archimandrite Giorgi; Priest Kirion; Hieromonk Angia; Hegumen Gabriel of the Monastery of St. Maksime Aghmsarebeli; Head of Tbilisi church of Assumption of Marry Priest Gelasi; Priest Zurabi; Deacon Alexsandre; Head of Kutaisi church of St. Nikoloz David "the state should not sign an agreement with the Patriarchate" March 12, 2001– newspaper Resonance N 064 (2199).

"...Consideration of the Patriarchate by the state as a religious subject could be considered as an interference with the theological issues, the competence and the right of which the state does not have".[38]

The said debate is relevant today as well and opinions about weakening the borders and constitutional standards (article 9 of the Constitution) between the state and the church are expressed time to time in a public space[39].

Based on the analysis of articles of the constitution, there are several basic principles reveled, such as:

- Inter-independence;
- Responsibility of the state to restitute the property of the church;
- Cooperation between the state and the church on the issue of common interest.

4.1.1 Principle of Inter-independence

This principle is set out in the first article of the agreement and it is not defined in the definitions of terms. Therefore, it should be defined according to the content of the constitution. In this case, article 9 of the constitution will be relevant, which stipulates: "The State ...shall recognise independence of the Apostolic Autocephalous Orthodox Church of Georgia from the State". Extended content of the constitution's provision is given in the agreement in which not only the independence of the church is protected but separation of the state from the church is also underlined.

Principle of autonomy of the church is also a part of the principle of inter-independence, which implies the existence of "special immunity" for the Catholicos-Patriarch, adjusting to the church's interests (dismissal from the military service), though, business activity, except producing ecclesiastic goods was banned to the church (article 6).

[38] Protosingelos Archimandrite Ioane, head of the church of st. Serapion Zarzmeli Archimandrite Giorgi; Priest Kirion; Hieromonk Angia; Hegumen Gabriel of the Monastery of St. Maksime Aghmsarebeli; Head of Tbilisi church of Assumption of Marry Priest Gelasi; Priest Zurabi; Deacon Alexsandre; Head of Kutaisi church of St. Nikoloz David "the state should not sign an agreement with the Patriarchate" March 12, 2001– newspaper Resonance N 064 (2199).

[39] Different positions existing in the society were shown at the time of initiation of the constitutional provision about family.

However, it is difficult to determine the scope of the principle of inter-independence and we might rather talk about „creeping" reality than the frames strictly ensured by law. Grounds for evaluation is given by the analysis of the legislation as well as public policy which will be discussed in detail in the next section.

4.1.2 Restitution of the property

Under the agreement, the state has recognized the damage to the church during the tsarism and soviet regime and also a historical-cultural heritage within and outside the country to be the church's property. Immovable property and the lands with active or inactive, or even the ruined religious buildings and chapels on it, were declared as the property of the church..

Under the said agreement the principle of restitution of property was introduced for the first time in Georgian legislation. In spite of the fact, that the special commission necessary for the restitution has not been created yet, the church has already been given a number of real estate and this process is still underway.

Researchers had noted about the difficulty of this process before adoption of the Concordat: "appropriation of orthodox churches, monasteries, despite their ecclesiastic purposes will not be resolved so easily, especially because, they often are built by the consent and using the financial resources of the public officials, including kings, feudals and others and descendants of those persons might have the right on them or to the sufficient compensation. "[40]

Authors fairly notice that, initiating the process with only one church caused a discriminatory attitude toward a number of other churches existed in Georgia and owned different types of property. The representative of the Catholic Church has also referred to this problem: "we also have such properties in Georgia and neither we should be oppressed, the law might not be two – it is always one[41]. However, researchers also noted the other side of the problem: "it is true that, nowadays, "the state of Georgia" is an owner of a specific property expropriated from Georgian Patriarchate, but it does not mean that the state should be responsible for the vandalism against Georgian Orthodox Church. This was done by the Soviet Union and its legal successor Russia responsible for the crimes committed during 1921-90. Therefore, Georgian Patriarchate should seek the compensation as well as acknowledgment of material and moral damage to them."[42]

[40] Professor Shukia Apridonidze – March 14, 2001 newspaper Republic of Georgian N60.
[41] Bishop of the Catholic church Fr. Jouzepe Pazoto – October 19, 2002 newspaper Resonance N285 (2770).
[42] Philosopher Zourab Tchiaberashvili "the state of Georgia and Orthodox Stalinism" – January 29, 2000 newspaper Europe N13.

The idea of a "historical ownership" is connected to the property issues enshrined in article 8 of the contract. According to this principle, the State recognizes ecclesiastic treasure protected by State security (kept at museums and treasury) to be in possession of the Church (except those owned privately). Critics pointed out that such precedent would create the situation, when other subjects would also have the same interest to restore their "historic property": there are a lot of goods, manuscripts, etc. which is not originated from Georgia in our museums and treasury. It is not difficult to foresee what happens if all historic owners, including representatives of ethnical and confessional communities demand possession of such exhibits. In that case, we will not be able to avoid international court with worse financial resources"[43] – Shuqia Apridonidze points out.

Among other issues already discussed, calculation of the damage is also a problematic issue. Calculation of this is also impossible. This complexity makes the issue of implementation of this obligation unclear. Under the contract, it is difficult to determine what is the total cost of the damage and when the damage should be considered as finally remunerated. Such criteria are not specified in any other legislative or policy document.

When discussing property relations, it is important to refer to the paragraph 6 of article 6 of the Concordat, around which a legal dispute arose before the Constitutional Court. Under this paragraph, the State upon agreement with the Church issues permissions and licenses on using official ecclesiastic terminology and symbols, also producing, importing and delivering ecclesiastic goods. This paragraph was appealed by Zurab Aroshvili, representative of "Orthodox Church in Georgia", who argued that this paragraph restricted the constitutional right of the freedom of religion. The Constitutional Court in its ruling (№2/18/206) as of November 22, 2002 explained that the said norm applies only to the terminology, symbols, etc. of the church which is the party to the contract. Therefore, representatives of other confession could freely use their own symbols, terminologies, produce ecclesiastic goods, etc.

4.1.3 Principle of cooperation

The contract specifies a number of fields on which the state and the church declare their intention to cooperate. The field of education is separated and several standards are determined by the contract:

- Voluntary to learn about orthodox religion;
- Recognition of the scientific degrees issued by the religious institutions;
- Supporting educational institutions of the Church's.

[43] Professor Shukia Apridonidze – March 14, 2001 newspaper Republic of Georgian N60.

This principle of cooperation is based on the voluntary and dispositional principles, which implies that there are opportunities for cooperation but the parties are not obliged to come to such agreements.

Usually, there are many dispositional norms in the contract, which give an opportunity to the state to change different agreements with the church and public policy decisions.

5. CONSTITUTIONAL AGREEMENT AND THE PROBLEMS OF RELIGIOUS MINORITIES

The Constitutional Agreement determined the privileges for the Orthodox Church not only in the legal sense but gave it a big advantage in the political context. Authors argue, that one of the major grounds for the problems facing the religious minorities is caused by the fact that the Constitutional Agreement exists solely for Autocephalous Georgian Church. Hereby we should note that formalist reading of the text and its interpretation by using the textual, grammatical and lexical methods will not be helpful to measure the political effect of the contract. However, if we use a teleological method to interpret the contract, it will be clear, that its authors and supporters aimed at granting a special status to the church and this is proved by the positions expressed by them at the preparatory stage as well as events occurred after adoption of the contract. The first have already been discussed in the previous chapters and now we will briefly review the reality after adoption of the contract.

5.1. Exceptional legal and Political status

"God bless" is accepted in the Christian world and it is written in the constitution that we are Christians and the religion is now at the Constitutional level and I do not understand, what you are talking about"[44] – judge Tabaghua well-expressed the disposition which is universally shared in the political and public institutions. Despite neutral nature of the constitutional regulation, the fact of signing the contract has been perceived by the state as granting a special status.

Researchers explain that granting the privileges to the church had political purposes: "every authority, from Eduared Shevardnadze to Bidzina Iva nishvili used the church's support as a tool for legitimation as well as to balance-maintain the political processes. Clear example of this might be resignation of Shevardznadze, when he declared his resignation, there was a mass demonstration

[44] Judge of Tbilisi Court of Appeals Besarion Tabaghua said this phrase when hearing the case of a dismissed employee of the ProCredit Bank on December 21, 2015 – Journal Tabula, January 21, 2016.

outside, Catholicos-Patriarch entered the building and publicly gave a blessing to Shevardnadze as a son of his spiritual nation to remain at the position. "[45]

Usage of the church as a source of legitimation during the political crises has already become a tradition. In spite of the fact that, relationship between the church and the state during 2003-07 made many people think that the process of "disestablishment" was about to approach, the situation changed in 2007. When the president resigned during the political crisis and returned to the power through the election, the state radically changed its attitude to the Orthodox Church, which is evidenced by the budget in 2009 when the church was financed by more than 25 million GEL while this budget in the previous year was 2.5 times less.

Participation of the representatives of Orthodox Church in the official ceremonies, meetings with the diplomatic delegations to Georgia as well as meetings of high state officials with the Patriarch where "consensuses" on the public policy issues were made between the parties, shows the high political importance and status of the church. This is also evidenced by the resolution N176 of the Government as of 2015, according to which, upon nomination by the Catholicos-Patriarch, 40 employees of the church can take advantage of the "service passports" and Catholicos-Patriarch, Head of foreign affairs service, Chorbishop, head of Georgian Orthodox Eparchy of Western Europe, and head of "Service for Pilgrims" religious tourism of the Patriarchate can take advantage of the "diplomatic passport"[46]. The said opportunities are the special privileges for the state officials[47], though as we see usage of these privileges are also granted to the representatives of the institution independent from the state.

5.2. Financing of religious organizations

Providing financial support to church from the state budget is already a tradition. The allocation of funds rises several questions: is it lawful to allocate funds to the church from the state budget? Is provision of the finances an expression of the state's good will or a legislative obligation?

Under article 11 of the Constitutional Agreement, the state acknowledges the material and moral damages of the church and undertakes an obligation to compensate. It remains unclear on what the

[45] Kristine Margvelashvili – impact of the church: political processes and elections in Georgia. Religion, society and politics in Georgia, Caucasus Institute for Peace, Democracy and Development, Tbilisi 2016, pg. 7.

[46] Resolution of the Government N176 on the approval of the procedures for the issuance of service passport, annex N1 Subparagraph t).

[47] Resolution of the Government N176 on the approval of the procedures for the issuance of service passport, annex N2, Subparagraph s).

state relies when calculating the damage. The question remains: if budget funding is a part of the compensation, which was pointed out several times by both parties, then it is interesting what the amount of this obligation is and when it will be finally remunerated as we have already mentioned.

The Government of Georgia made a decision under its resolution as of January 27, 2014[48], to compensate the material and moral damages to four other religious communities as well who suffered during the soviet period. Under article 3 of this resolution, the damage should be compensated for those religious organizations registered as a legal entity of public law by January 27, 2014. These are: Islamic, Jewish, Roman-Catholic and Armenian Orthodox church. The resolution was criticized by the civil organizations as well as Public Defender. Public defender points out in his report that this resolution should also apply to other religious organizations, as not only the religious organizations determined by the resolution as of January 27, 2014 are victims of Soviet repressions[49]. The questions asked above are also relevant to this resolution and we believe that existing rules of financing not only does not equalize the religious organizations, but forms a new basis for discrimination, which is also indicated in the statements made by non-governmental organizations.

A number of reports of the Public Defender were devoted to the financing of religious organizations as a problematic issue[50]. Numbers of the previous year are the most impressive. In particular, " in 2013 funds allocated to the church constituted 29 220 349.7 GEL, 13% of this money was allocated from the local self-government budgets[51], is should also be noted that after examination of the documents (under which the funds were allocated to the Patriarchate) of 41 municipalities, in more than half (52%) cases, objectives of financing was not clear for the self-government unit."[52] Results are more deplorable with respect to the objectives of transferring immovable property. In particular, in nine cases (86%) out of ten, objectives of making transfer of immovable property is unclear[53]. Updated data is provided by the Tolerance and Diversity Institute research, according to which during 2014-15 the funding exceeded 32 million[54].

48 "On some activities connected to the partial compensation for the damages of the religious communities existing in Georgia during the Soviet totalitarian regime".

49 Report 2015 of the Public Defender – http://www.ombudsman.ge/uploads/other/3/3512.pdf

50 1) Second half of 2009 report of the Public Defender – http://www.ombudsman.ge/uploads/other/0/83.pdf;
2) Report 2012 of the Public Defender – http://www.ombudsman.ge/uploads/other/0/86.pdf;
3) Report 2013 of the Public Defender – http://www.ombudsman.ge/uploads/other/1/1563.pdf;

51 Human Rights Education and Monitoring Center (EMC) and Tolerance and Diversity Institute (TDI) – „practice of the religious organizations by the central and local governments", 2014.

52 Human Rights Education and Monitoring Center (EMC) and Tolerance and Diversity Institute (TDI) – „practice of the religious organizations by the central and local governments", 2014.

53 Human Rights Education and Monitoring Center (EMC) and Tolerance and Diversity Institute (TDI) – „practice of the religious organizations by the central and local governments", 2014.

54 The organization published the results of the survey on July 14, the survey is available at the organization's web-page: www.tdi.ge.

5.3. Preferential tax regime

Tax Code of Georgia regulates taxation of the activities of religious organizations. According to the Code, religious activity is not considered as an economic activity. Therefore, different rules of taxation apply to it. For the purposes of taxation, Religious activities shall be considered to be the activities of a religious organization (association) registered according to an established rule purpose of which is to spread confession and religion. Activity of those enterprises of religious organizations (associations) to publish religious (religious service) literature or produce religious items; the activities of these organizations (associations) or their enterprises connected with the realization (dissemination) of religious (religious service) literature or religious items; as well as the use of the funds received from the above activities for performing religious activities.

Profit received by the Patriarchate of Georgia from the sale of the crosses, candles, icons, books, and calendars used for religious purpose is exempted from corporate income tax[55]. Under article 168 of the Tax Code, the supply of a cross, a candle, an icon, a book, a calendar, and other religious items by the Patriarchate of Georgia that are used exclusively for religious purposes are exempted from VAT. Under the same article, construction, restoration, and painting of cathedrals and churches with the order of the Patriarchate of Georgia are also exempted from VAT;

Under article 206 of the Tax Code, property of religious and other organizations which is not used for economic activities as well as structures considered as historical, cultural, and/or architectural monuments are exempted from property tax.

Reference to the patriarchate separately creates a discriminatory environment which is pointed out by the Public Defender: „the Tax Code of Georgia establishes a regulatory regime for one specific church which creates unequal environment for other religious organizations[56]. Report of the U.S. Department of State has the same content: "privileged legislative and tax status of the Georgian Orthodox Church remains to be a problem"[57].

Because of the said privileged condition of Orthodox Church, eight religious organizations (Caucasus Apostolic Administration of Latin Catholics, Evangelical-Baptist Church of Georgia, Georgian Muslims Union, Faith of Gospel Church of Georgia, Trans-Caucasus Union of Seventh Day

[55] Article 99 of the Tax Code of Georgia.
[56] Second half of 2008 Report of the Public Defender – http://www.ombudsman.ge/uploads/other/0/80.pdf
[57] Report of the U.S. Department of State 2012 – http://www.state.gov/j/drl/rls/irf/2012religiousfreedom/index.htm#wrapper;

Christian-Adventist Church, Word of Life Church of Georgia, Holy Trinity Church, Christ Church) applied to the Constitutional Court on October 15, 2015 and requested tax privileges enlisted in the Tax Code to be considered as unconstitutional according to the article 14 of the constitution. The case is still to be decided by the court.

5.4. Persecution on the religious grounds and the problem of effective response

Violence against religious minorities has a systemic nature. Facts of verbal and physical violence against specific religious groups are frequent. The problem discussed in the Ombudsman's 2004 report still persists and is considered to be very serious in the report published in 2015.

Jehovah's Witnesses, the Muslim community, Evangelical-Baptists, Anglican Church, this is an incomplete list of religious organizations which are raided and whose property, religious goods are damaged, etc. If by 2005 the number of facts of violent remained within ten and until 2012 the annual data did not exceeded 20 cases, after 2013, only in one year when a number of well-planned raids occurred with the involvement of the state against Muslim community in Nigvziani, Tsintskaro, Cikhisdziri, Samtatskaro, Tchela – the number of persecutions doubled. For instance, during 2014 reporting period, the Ombudsman became aware about up to 45 cases of persecution, verbal and physical abuse and discrimination against Jehovah's Witnesses. All of these cases are fully documented in the annual reports of the U.S State Department too[58].

Violence on religious grounds is accompanied by the failure of the state authorities to respond effectively, which often has an encouraging effect for those committing violence. We observe the failure of effective responses from the law-enforcement agencies, as well as the investigation and the courts.

In all reports of the Ombudsman, which refer to the violence on the religious ground, signs of inadequate response from the state has a central role[59]. Considering the fact, that Georgia has a

[58] U.S. DEPARTMENT of STATE – country reports on human rights practice:
http://www.state.gov/j/drl/rls/irf/2012religiousfreedom/index.htm#wrapper;
http://www.state.gov/j/drl/rls/irf/2013religiousfreedom/index.htm#wrapper;

[59] 1) for example, Kvareli incident as of November 19, 2010 "Inability to access the results of investigation conducted by Police on the raid against Babtist church – Report 2010 of the Public Defender – http://www.ombudsman.ge/uploads/other/0/84.pdf;
2) Nigvziani incident as of November 2, 2012 "security of muslim prayers was not ensured by the law enforcement bodies - Report 2012 of the Public Defender – http://www.ombudsman.ge/uploads/other/0/86.pdf;
3) Tchela and Mokhe incidents were law enforcement bodies are likely to be guilty – Report 2014 of the Public Defender – http://www.ombudsman.ge/uploads/other/3/3509.pdf;

very negative experience in terms of religious violence, we should understand that any ineffective step taken by the state creates a precondition for the escalation of violence as it was during 1998-2003.

One of the most relevant and continuing problem refers to the teaching of religion at schools which becomes a ground for the persecution on religious ground. This issue is discussed in almost all reports of the Ombudsman from 2004 to 2015. Proselytism at the public school, indoctrination, exhibition of religious symbols in the school space for nonacademic purposes are just a few of the problems.

There are a frequent facts of violence and manifestations of hatred expressed by teachers against non-orthodox pupils[60].

European Commission against Racism and Intolerance (ECRI) in its report 2010 on Georgia stated directly that "pressure by teachers against children who do not belong to the majority religion remains to be a problem".

The method and content of religious studies at the general education schools rises also concerns. Things thematically connected to the religion is perceived by the pedagogues as the teaching of "God's law"[61] and focus is made on the information spread by the Georgian Orthodox Church.

5.5. Facts of the seizure of property of religious minorities

Ongoing property disputes between churches are one of the most significant issues which clearly demonstrate the discrimination against religious minorities. Majority of religious organizations have not received historical heritage. In the best cases, usage of the property by them is regulated under individual agreements with the state, which imposes the right to use the property. Religious organizations often factually hold the property without any legislative regulation. Guaranties for

[60] 1) incident at the public school N2 in Telavi: "there was the facts of humiation by the teachers of the school against the pupils because their perents were Jehova's Witnesses – First half of 2007 Report of the Public Defender http://www.ombudsman.ge/uploads/other/0/77.pdf
2) The teacher baptized the pupil whose perents were members of Jehova's Witnesses as an Orthodox Christian against his will in 2012, Oni – Report 2012 of the Public Defender – http://www.ombudsman.ge/uploads/other/0/86.pdf
3) Chumlaki public school incident „the pupil became a victim of physical and verbal abuse several simes because of the Evangelical-Baptist religion" – Report 2013 of the Public Defender – http://www.ombudsman.ge/uploads/other/1/1563.pdf

[61] 2004 Report of the Public Defender – http://www.ombudsman.ge/uploads/other/0/72.pdf.

the Georgian Orthodox Church to return historical properties is included in the Constitutional agreement, resolving the property issues of other denominations remains dependent to the state's good will. For instance, Muslims community claims the mosques located at Aghmashenebeli Street N100, Kobuleti and 5 mosques in the regions of Adigeni and Akhaltsikhe[62].

The problem is exacerbated by the facts of forceful "seizure" of religious buildings of minority religious organizations. The Ombudsman's report 2005 refers to the property, which is owned by the Georgian Orthodox Church, but historically it was the property of minorities[63]: "Armenian church demands returning of 6 churches in Georgia, all six are historically Armenian and were Georgian Orthodox Church have not started a liturgy yet[64]. Information about these said six Armenian churches and generally, about the disputed properties, are systematically marked in various international reports[65].

The Catholic Church also actively requests the churches seized during the Soviet period to be returned. Part of the property seized during the Soviets is still in the state's ownership and the Catholic Church cannot use the property. Disputes Between the churches arose in 90s. Nowadays, Orthodox Churches operate in the Catholic Churches in Kutaisi, Batumi Akhaltsikhe and Gori. The Catholic parish in Kutaisi initiated legal claim to demand the property but the Supreme Court refused to satisfy the claim and recognized the Catholic parish as an unauthorized party[66].

The problem discussed exists for two decades and is not resolved yet.

---

62 Second half of 2009 Report of the Public Defender – http://www.ombudsman.ge/uploads/other/0/83.pdf.

63 Hereby the Ombudsman recommends the Minister of Culture of Georgia to settle urgenly the issue related to returning the churches back, historical origin of which is not questionable, to the Apostolic Church of Armenia and to create a competent commission in order to study the origin of other churches. At this stage, the issue of returning the following churches might be settled the most urgently: Norasheni (Tbilisi, leselidze street) and Surbnishani (Akhaltsikhe), which will be the sign of good will and the beginning of dialogue. – http://www.ombudsman.ge/uploads/other/0/73.pdf.

64 Fr. Nareki – journal Liberal, August 6, 2009.

65 U.S. DEPARTMENT of STATE – country reports on human rights practice: http://www.state.gov/j/drl/rls/hrrpt/2004/41682.htm; http://www.state.gov/j/drl/rls/hrrpt/2005/61649.htm; http://www.state.gov/j/drl/rls/hrrpt/2006/78813.htm; http://www.state.gov/j/drl/rls/hrrpt/2007/100560.htm; http://www.state.gov/j/drl/rls/hrrpt/2008/eur/119080.htm; http://www.state.gov/j/drl/rls/hrrpt/2009/eur/136032.htm; http://www.state.gov/j/drl/rls/irf/2010_5/168312.htm; http://www.state.gov/j/drl/rls/irf/2011religiousfreedom/index.htm#wrapper; http://www.state.gov/j/drl/rls/irf/2012religiousfreedom/index.htm#wrapper; http://www.state.gov/j/drl/rls/irf/2013religiousfreedom/index.htm#wrapper; http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper; http://www.state.gov/documents/organization/236738.pdf;

66 Report of the Public Defender, 2006 – http://www.ombudsman.ge/uploads/other/0/76.pdf.

6. CONCLUSION

Constitutional Agreement established the frame of relationship between the state and the church. Despite declaratory nature, constitutional status of the agreement granted a de-facto and in some cases, de jure privileged status to the Georgian Orthodox church. Cooperative attitude set out in the text of the Agreement excludes representatives of other churches from such relationships and if it still happens anyway, it is based on the general legal framework which leaves the possibility of a double interpretation and therefore is not sustainable. Based on the constitutional agreement the Georgian Orthodox Church maintains the privileged status which ensures its participation in the process of public policy determination although such direct provision does not exist in the Agreement. "Fluid" constitutional standards need additional explanation for further implementation of the Agreement as it is a fact, that interpretation made by the constitutional court in 2002 has not had an effect on the practice of public institutions and could not create an equal environment for the relationship between the state and religious organizations. Moreover, the contract strengthened the ground for the legalization of informal privileges existed before as well as for granting the status of the "state religion" to the Georgian Orthodox Church" which is contrary to the principle of "separation of the state and the church" protected by the constitution.

MARIAM BEGADZE
Master of Laws - Central European University,
Human Rights Education and Monitoring Center (EMC).

SECULARISM: FRAMEWORK OF THE RELATIONSHIP BETWEEN STATE AND CHURCH

INTRODUCTION

Religion with its natural condition is "in competition" with other religions, exclusive towards them, which is a part of implementation of its function – religious doctrine. Therefore, direct association of the state with one of the religion excludes the protection of freedom of religion and guarantees for the prohibition of discrimination between religions. The primary function of the state in contrast with the exclusive nature of religion is to create inclusive space for citizens[1]. Apart from these, both, the state and the church impose obligations on their members/citizens, between which a conflict might arise.

Because of the natural interdependence, consensus is reached on the necessity of separation of the state from the religion. Such separation is characterized by the concept of secularism.

Secularism is an integral part of a democractic state and the rule of law as it represents an expression of collective conscientious objection of people against association of the state with any religion and therefore it is one of the means of exercising people's sovereignty. Religion might also be viewed as a social construction and accordingly, secularism conditioned by it, though because of the stable grounds of the social construction in the society[2], this does not cause a sub-

1 Ronald Dworkin, *Taking Rights Seriously*, Bloomsbury Revelations Series (London: Bloomsbury, 2013), 219-220.
2 András Sajó, Constitutionalism and Secularism: the Need for Public Reason, pg.4.

stantive change and in practice, the principles of democratic, legal and secular state have equal and complementary nature.

Despite consensus on the necessity of secularism, boundaries between the state and the church differ according to countries. Models existing in democratic and legal states might be divided into three categories: strict separation, neutrality and accommodation models. According to the model of strict separation, state and church should maximally be distanced from each other. According to the model of neutrality, state should be neutral toward religious institutions and confer no advantage upon any of them. Accommodation model considers that religion has an important role in public life and partly encourages development of religious institutions, though within the framework of this model, coercion to participate/support or discrimination of religious organizations by the state are also excluded.[3]

Existence of different forms of secularism is caused by the different historical backgrounds[4] of the concept's establishment in a specific place as well as its partly ambiguous content capable of being interpreted in different ways[5]. When the concepts can be interpreted arbitrarily, reference only to the concept and giving it a determinant importance, eliminates the possibility of considering opposite argument as well as a rational discussion[6]. Even hostile politics of the Soviet Union against the church might be justified by the formal argument of secularism, though obviously a number of aspects of this politics, such as confiscating religious buildings from the religious organizations was not an act characteristic to the inclusive state, as it was associated with one of the ideologies – atheism and determined by it.

Thus, in parallel with avoiding a close association when separating the state and church, there is a risk of transformation of their interrelation into the other radical form – repressive policy. Therefore, in order to develop an acceptable form of separation between the state and the church it is necessary that the state found the right balance between avoiding association and repressive politics. In case of such balanced secularism, we will not have the relationship which is based on the concept as a specific ideology, formal separation between the state and church, but which uses the concept, as a specific logical framework, as a ground[7]. In order to begin rethinking secularism

3 Chemerinsky, E. (2006). Constitutional law (3rd ed.). New York, NY: Aspen, 1707.
4 András Sajó, Constitutionalism and Secularism: the Need for Public Reason, pg.5.
5 Keny Greenawalt, *secularism, religion, and liberal democracy in the united states,* Cardozo Law Review, Vol. 30, 2009, 2383.
6 "Dignity" is similar, stating it as an argument loses the chance of presenting an opposing idea. See the case of the European Court of Human Rights – *Peta v. Germany.*
7 Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, Mass.: Harvard University Press, 2014), 5.

as a means of achieving a goal, the theory of "Public Reason" of John Rawls, according to which religious motives are fully acceptable, if they can be "translated" on the grounds acceptable for all, serves a good basis.

The present paper serves development of a logical definition of the concept of secularism acceptable for both stakeholders and than an illustration that the restriction of any right should serve not the secularism itself, but the right understanding of the goal to be achieved through it and serve that goal itself.

The logical framework of secularism is to guarantee the possibility for the state and the church to exercise their functions. As already mentioned, function of the religious organization is to exercise confessional goals determined by the doctrine while the state is an instrument to ensure coexistence of people with recognition and protection of human rights (including the security guarantees).

The present work paper argues that discussing secularism in view of the functions exercised by the state and the church displays the form of secularism acceptable for both stakeholders. Based on the analyses of separate decisions, the paper offers specific examples when it is necessary to invoke an argument of secularism to maintain autonomous space for existence of the state and the church.

The state violates a logical framework of secularism when it obstructs the church to implement its doctrine or/and evaluates, delegitimizes the doctrine/religion. Such self-restraint of the state is limited by the state's obligation to be neutral towards any doctrine, ideology in terms of prohibition of discrimination and positive obligation to protect other rights. The margin of self-restraint also lies with the state's authority to obstruct the church to come out from its natural condition and privatize public space.

For its part, decisions made by the religious organizations about exclusion of its members from its community because of the differences between their views, is left beyond prohibition of discrimination and the states' obligation to protect human rights, as the motive of religious organizations to be associated with their doctrinal theses is a part of their function and is justified.

Precondition for a reasonable deliberation of these issues is an exsitance of preliminary agreement that while exercising the national sovereignty and exercising the secularism as well as ensuring freedom of religion and prohibition of discrimination, the state is free from any ideology,

does not support rejection of the religion by getting close to atheism, but is inherently in a different position and has the obligation to ensure "safe pluralism". While performing this obligation the state's attitude toward religions should be based not on the preliminary confidence but the formula of equal indifference, which will leave an autonomous space necessary for their functioning.[8]

According to the deliberation above, any restriction behind the protection of the concept of secularism should be based not on the autonomous definition of any legal system, but on the goal of the concept of "secularism", protection of the balance between the functions of the state and the church. Thus, "secularism" should not be perceived as a goal, but an instrument/means to reach the goal. This resembles the principle of separation of powers between the state's branches as similarly there are various attitudes toward it on the national level, and the European Court of Human Rights does not legitimize or reject any of the specific models while deliberating this issue, but speaks about the practicability of effective protection of human rights by means of such division of powers. Alike, this principle is not a goal, bat a means of reaching the goal.[9]

The present paper deliberates secularism as a logical framework in sequential components. With this regard, case analysis does not aim at providing a comprehensive and sequential description of one of the legal systems, but at reviewing different aspects of relationship between state and church in the context of the cases and attempts to put an interrelation between the state and church, balance between their function in the one logical, sequential line.

The first chapter deliberates the place of freedom of religion among human rights and its relation to the principle of secularism. The second chapter explains that separate protection of the freedom of religion does not automatically give preference to the followers of a religion and does not result in differentiation between the insult of religious and other feelings.

The third chapter reviews definitions offered by different legal systems. The fourth and fifth chapters specify that secular state does not mean disappearance of the state from the public space, an aim to separate from church or ignoring religious motives when developing state policy by assuming that religious motives cannot be transformed into a public goal.

The next two chapters relate to the scope of autonomy of religious community and its individual members and borders set at the non-interference by the state in it, namely drawn at the protection from privatization of the public space, human rights and equality.

[8] ibid, 11, 17–18.

[9] David Kosa (2012). Policing Separation of Powers: A New Role for the European Court of Human Rights? European Constitutional Law Review, 8, pp 33-62.

Introduction of the present paper outlines the main theses for future deliberation and the conclusion sums up opinions developed based on the analyses of cases relating to different aspects of the relationship between the state and the church.

1. SPECIAL NATURE OF RELIGION OR ONE OF THE FORMS OF FREEDOM OF EXPRESSION

There is an opinion in theory that rejects recognition of freedom of religion with the argument that protection of the right to have an opinion and the forms of its expression subsume religious belief as well as its manifestation.[10]

However, it is important to note, that the case of religion is different and that it often determines obligations for its followers, which makes religiously motivated choices, provided that it reaches the minimum standard of seriousness,[11] different from libertarian ones and makes them legitimate even when it is contrary to law (e.g. in case of conscientious objection of Pacifists)[12]. Religion is a special form of expression as it implies features of identity and the level of seriousness which might determine the most preferable existential interest for a human being[13]. All these together make some requirements legitimate despite its contradiction with law. The referred differences give us the possibility to embrace logically the separate protection of the freedoms of religion and expression under regional and international mechanism for the protection of human rights.

To some extent, this determines the role of secularism. Because of the special nature of the religion and belief, their protection cannot be ensured when the state directs its resources to one of the specific religions, gives preference to it or is associated with it. By doing so, it underlines the supremacy of one over others and infringes dignity of believers (or non-believers). Such state deprives human's supreme belief of its validity, rejects its importance and is no longer a tool for an inclusive coexistence.

That is why, despite the concept of freedom of expression, one cannot have a legitimate request to prohibit the state to finance cultural events not acceptable for them. Contrary to this, different

[10] W. Cole Durham and Brett G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives*, Elective Series (New York: Aspen Publishers, 2010), 202, 203.

[11] Standard of "cogency, seriousness, cohesion and importance" in Campbell and Cosans v. the United Kingdom, ECtHR (1982): at 36

[12] Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 79-80.

[13] Bernard Williams, *Moral Luck: Philosophical Papers 1973 - 1980*, Reprinted (Cambridge: Cambridge Univ. Press, 1999), 14. Raymond Plant, "Religion, Identity and Freedom of Expression," *Res Publica (13564765)* 17, no. 1 (February 2011): 16-17.

nature of freedom of religion and belief requires from the state to refrain from making support of a specific religion its public interest.

2. SEPARATE PROTECTION OF RELIGION AND GIVING PREFERENCE TO NON-BELIEVERS

Separate protection of religious freedom does not automatically give preference to -believers, e.g. in relation to atheist authors enjoying the right of freedom of expression, who might insult religious feelings of others by their occupation when the restriction of their activity might be offensive to them too.

Establishing hierarchy of human rights is prohibited as it was outlined in the preamble of the Universal Declaration of Human Rights as of 1948 by underlining the universal, inalienable and equal nature of the rights.[14] Accordingly, protection of the freedom of expression is not a less important of an interest just because the freedom of manifestation of religion protects believers. Subject of the protection of human rights is not a belief or religion, but a human being. Legitimate and proportional restriction of expression which insults believers might only serve the protection of other human rights.[15]

According to the deliberation of the European Court of Human Rights, one who expresses its religion is obliged to tolerate and accept rejection of their religious belief from others, , even hostile propaganda against his/her belief[16]. The European Court considered restriction of freedom of expression, the criticism against religious leaders, because of it being insulting to the believers, as a violation of the convention in the cases of *Klein v. Slovakia* and *Giniewski v. France*. In the latter case, scope of protection by the Convention extended to the criticism pointing to the signs of Anti-Semitism in the Pope's statement and the Catholic Church's contribution to the extermination of the Jewish people.

In the case of *Choudhury v. the United Kingdom*, the Court found the request of the applicant inadmissible, who, based on the positive obligations of the state according to the guarantees for the freedom of religion, demanded from the Court to find that the state's inactivity toward insult caused by the book of Salman Rushdie was a violation of the Convention. According to the court, positive obligation to protect religious feelings from insult expressed in oral or written form does not exist and it is not part of freedom of religion.[17]

[14] Ibid.
[15] See cases of Norwood v. United Kingdom (ECtHR), Ross v. Canada (HRC).
[16] I.A v. Turkey (ECtHR 2005): 28.
[17] Choudhury v. the United Kingdom (ECommHR 1991), admissibility decision.

Besides secularism, state neutrality and equality, requirement for equal protection of citizens despite their beliefs, is also derived from the principle of popular sovereignty. When expressing its subjective attitude toward its believer or non-believer citizens, the state apart from violating these principles, is in contradiction with its own inclusive nature.

3. DEFINITIONS OF THE CONCEPT OF SECULARISM AT THE NATIONAL AND INTERNATIONAL LEVEL

Principle of separation between the state and the church is enshrined in the constitutional law of different countries.[18] Because of a number of historical reasons the principle is directly stated in the text of constitution of the states such as France, Turkey, and India.[19] Secularism is recognized by its alternative concepts such as neutrality and impartiality at the international level as well.

European Court points out that when regulating any issue related to different religions and belief systems, the state should remain neutral and impartial, which, first, is important for ensuring the pluralistic environment and operation of democracy in the state[20]. Reflection of this principle might be seen in the second paragraph of the first protocol to the Convention, which establishes parents' right to the environment free from indoctrination in the public school.

The United Nations Commission on Human Rights pointed out in the case of *Arieh Hollis Waldman v. Canada,* that financing of catholic schools from the state resources was a discrimination while other schools could only operate by private funds. The Commission explained that financing religious schools is not an obligation of the state and therefore ensuring secular public education complies with prohibition of discrimination, though if the state decided to finance religious schools, this should necessarily be done without giving preference to any of the religious groups.[21]

The principle of secularism was considered as a natural part of the freedom of religion by the Supreme Court of Canada in the case of *Mouvement laïque québécois v. Saguenay (City).* According to the Court, the state should remain neutral; in particular, it should neither give preference, nor obstruct followers of any faith. This serves the maintenance of free and democratic society. According to the judgment, if the state supports specific expression of religion by using a cultural and historical reality or legacy as an excuse, it violates obligation of state neutrality, under which administration of public authority to support a specific confession is prohibited.

18 Norman Doe, Law and Religion in Europe, Chapter: Property and Finances of Religion, p. 175.
19 András Sajó, Constitutionalism and Secularism: the Need for Public Reason, pg. 7.
20 Metropolitan Church of Bessarabia v. Moldova, p. 116.
21 Arieh Hollis Waldman v. Canada, p. 10.6.

Constitutional Court of Germany in the case of *Mixed Marriage Church Case* recognized an act as unconstitutional, under which non-religious employed spouses of church members were subject to the church tax and pointed out that the state had an obligation of religious and ideological neutrality. Therefore, the state cannot transfer sovereign authority to the church over the people who are not its members. Constitutional Court of Germany explained that while considering this issues, the fact that the church had a privileged status at any different stage in the history does not matter, since state religion, in its classical form, does not exist anymore when there is separation between the state and the church.[22]

The U.S Supreme Court in the case of *Larson v. Valente* underlined the principles of neutrality and prohibition of favoring one religion over another and pointed out that freedom of religion will be guaranteed only under conditions of free competition. According to the Court, freedom of religion is protected only when the legislator and voters are obliged to demonstrate the attitude towards new and unpopular religions similar to the one they have towards their religion or belief. The same court in the case of *Lemon v. Kurtzman* considered "**excessive** government **entanglement**" with religious affairs unacceptable based on the separation of the state and the church and the principle of secularism. The court found the financing system unconstitutional related to the financing of secular studies in any religious school as this system created an opportunity of arbitrariness from the state to interfere in the activities of religious schools in terms of examining targeted expenditure of the finances and besides this, teachers of secular subjects could use the funds for religious aims. The Supreme Court developed the test, according to which any law should be based on a secular goal, should not support one of the religions and at the same time should exclude ""**excessive** government **entanglement**" with religious affairs.

The Constitutional Court of Georgia has also made its first references to the recognition of secularism by the Constitution.[23] The Constitutional Court of Georgia saw the principle of secularism under Article 9 and considered it as the part of the constitutional order. Besides, it explained that this principle implies functional separation of the state agencies from the operation of religious institutions. According to the Constitutional Court, confessional aims of religious organizations shall not be functionally connected to the public authorities and such connection would violate the principle of secularism. [24]

22 Mixed Marriage Church Case (1965), German Constitutional Court.

23 Georgian citizens – Giorgi Kekenadze, Nino Kvetenadze and Besiki Gvenetadze against Parliament of Georgia (judgment as of February 26, 2016).

24 Judgment of the Constitutional Court of Georgia as of February 23, 2016 on the case Georgian citizens – Giorgi Kekenadze, Nino Kvetenadze and Besiki Gvenetadze against Parliament of Georgia.

Based on the analyses of the given cases, according to the common definition of secularism, the consensus is already reached on the issue that the state should not be associated with a specific religious group and should not direct its authority to support any of the religions. The state authority shall not be used to diminish or strengthen religions.

Such state policy is impermissible even when this is not a targeted choice of thestate, but is used as a means of legitimizing itself,as the state legitimacy should be driven from the people, with disregard of indirect forms , being the essence of the popular sovereignty. Otherwise, there are risks of interference of a religion in the state policy and, in case of religious organizations' dependence on the state, there are theoretical risks in terms of unjustified interference of the state in their autonomy.. As constitutionalist András Sajó explains, "A union of secular and ecclesiastical control would equal tyranny, irrespective of the fact which one of these entities has absolute power".[25]

4. SECULAR OR RELIGION-FREE STATE (PRIVATIZATION OF RELIGION)

Proactive policy administered by the state aimed at underlining separation from the church might be a reflection of excessive role of the church in the state's operation in spite of the fact, that at a first glance, it is aimed at diminishing this role.

With this regard, it is relevant to mention the cases of "Sunday closing laws"[26] in which the courts evaluate the practice in old times conditioned by religious doctrine. The U.S Supreme Court in the case of *McGowan v. Maryland*[27] favored acting secular goal of the law (announcement of public holiday in the interest of health and unity of the family) and assessed its connection to the confessional goals in the past as an insignificant factor. Otherwise, the religious goals which are not currently implemented under effective law could have regained significance based on this decision and effective secular law could have been rejected because of the need to be separated from religion. .

An aggressive secular policy of the state in some cases crosses the borders of neutrality and impartiality itself. The state's fear of religious fundamentalism might become a reason for the stereotypical policy of the state.

[25] András Sajó, Constitutionalism and Secularism: the Need for Public Reason, pg. 7.

[26] See also the case of the Supreme Court of Canada *R v Big M Drug Mart Ltd* and the case of the Constitutional Court of Southern Africa *State v. Lawrence.*

[27] See also the case of the Supreme Court of Canada *R v Big M Drug Mart Ltd* and the case of the Constitutional Court of Southern Africa *State v. Lawrence.*

In this regard,"Islamic Headscarf" cases are especially interesting. The European Court of Human Rights considers the state' restriction on wearing Islamic headscarves permissible. In these cases, the Court's reasoning was based on the maintenance of a democratic state, principle of gender equality and presumed negative effect of wearing the headscarves on others. In these cases the Court's attitude is displayed, namely it perceiving a specific religion as inconsistent with democracy. [28]

The case of *Dogru v. France* is worth to be mentioned seperately. It related to the expulsion of an 11-year-old girl from school for refusing to remove the headscarf. The Court emphasized that from the factual circumstances, because of the student's said refusal, overall tension was evidenced at the school.[29] This was the case in spite of the fact that the Court in other cases discourages states to eradicate the tension caused by the co-existence of religions[30]. In the same case, the Court considered that the manifestation of religion expressing attitudes contrary to the principle of secularism might not be protected under article 9 and belongs to the state margin of appreciation.[31]

Unlike other cases, *Leyla Sahin v. Turkey* related to the right to wear headscraves by the majority of the population at the universities as well as in other state or educational institutions. Accordingly, the Court considered dominant position of Islam as an additional argument, in particular, according to the Court, in the state where 94% of population are Muslims, wearing Muslim headscarves would put an existence of an environment free from coercion and intimidation under doubt.[32]

The Constitutional Court of Germany displayed a different viewpoint in the case concerning the blanket prohibition of wearing the headscarf by a teacher. The Court pointed out in its judgment that "wearing a headscarf is a religious expression by individual and not the state". Besides, according to the court, wearing the headscarf is not contrary to the educational goals of Germany or the State neutrality.[33]

For comparison, the decision of the European Court of Human Rights in the case of *Lautsi v. Italy* is worth noting. in which an obligatory display of the crucifix was considered to be permissible by

28 See below a deliberation of the case Refar Partisi v. Turkey.
29 Dogru v. Fracne, para 74.
30 Metropolitan Church of Bessarabia and others v. Moldova, (ECtHR 2001): 116.
31 Dogru v. France, para 75.
32 Leyla Şahin v. Turkey, 111, 114 (ECtHR Grand Chamber 2005): 111. Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford ; New York: Oxford University Press, 2009), 434-435.
33 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html;jsessionid=CCFF242F94FFE23D1AA2EDD9BD04281A.2_cid370.

underling its passive role as a religious symbol[34]. Bias is more evident in so called "crucifix cases" considered by the national Courts. They directly refer to the Christian roots of a democratic state and contradiction of Islam with such states, such comparison comes into play even when the claimants are atheists, not Muslims.[35]

Focusing on the symbolic content of Islamic headscarves and its inconsistency with the democratic values, secularism, gender equality while disregarding and rejecting any special symbolic significance in "crucifix cases", pointing out that the crucifix is not associated with an imposed study of Christianity, indicates that the national courts as well as an international court see creation of a secular environment free from religion as a goal in itself, it also points to the problems of impartiality under the pretext of achieving such a goal, and to an attempt to privatizate the religion.[36]

5. RECOGNITION OF RELIGIOUS MOTIVES

The state free from the influence of religion does not nesecessarily implie fredom from religion. According to the attitudes existing in theory, principle of secularism does not reject existence of religious motives in the state politics, though explains that reasons for the necessity of such motives should be acceptable for everybody and justification for such need should not only be based on the reference to the confession and its transcendental considerations[37]. It should be possible to "translate" it into the grounds acceptable for everyone.[38] This attitude established in the constitutional law is based on John Rawls's theory of "Public Reason" which recognizes religious motives, though with its transformed form in the relevant political reasoning.[39]

The concept of secularism established with this assumption comes closer with an understanding of the popular sovereignty as it ensures agreement on the fact that each member of the society has an ability to think soundly and to participate in political decision-making.[40]

---

34 Lautsi v. Italy, p. 72.

35 Constitutional Secularism in an age of Religious Revival, Susanna Mancini and Michael Rosenfeld, p. 123.

36 Constitutional Secularism in an age of Religious Revival, Susanna Mancini and Michael Rosenfeld, p. 122.

37 Andras Sajo, *Preliminaries to a concept of Constitutional Secularism* in Constitutional Secularism in an age of Religious Revival, Susanna Mancini and Michael Rosenfeld, p.55.

38 András Sajó, Constitutionalism and Secularism: the Need for Public Reason, pg.1.

39 John Rawls, "The Idea of Public Reason Revisited," *The University of Chicago Law Review*, 1997, 766, , 780, 783, 784, 799, 800.
Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 63.

40 Ibid, page 2.

That is why under certain circumstances financing of religious organizations is allowed in the secular states. For example, in some countries, tax deduction system applies to those who decide voluntarily to support financially any church. In this case, one voluntarily makes a financial contribution and is partially exempt from the tax before the state[41]. In such systems, the state allocates funds from the taxed amount of the income though these funds are of a reasonable amount and based on the voluntary decision of the members of a church, without prior intention of the state to support the church, when its arbitrary role is decreased.

Financing religious organization might legitimally serve the performance of a public function, including the guarantees to enjoy the freedom of religion, a good example of which is a Chaplaincy[42]. Besides, financing a religious education at school is also acceptable within the framework of which teachers representing different denominations are financed for conducting religious lessons.[43] For example, in Hungary religious organizations with a legal status are financed alike and equally to state institutions for educational, social, healthcare activities.[44] It should be noted that while performing such public functions, religious organizations with a legal status are accountable before the state like any other types of organizations.[45]

In the case of *Bruno v. Sweden,* the European Court of Human Rights differentiated performance of confessional and public (acceptable for everyone) functions by the religious organizations. The Court found admissible to tax the citizens for the expenses, which are connected to the performance of non-confessional functions of the church such as administration of funerals and distinguished it from the finances serving certain confessional goals.

However, despite acknowledgment of religious motives, under certain circumstances their transformation into public goals is unacceptable because of the natural condition of religions. For example, delegation of a relevant authority to the religious organization to ensure access to education is contrary to the understanding of the state's public function of being an instrument of the public sovereignty and of creating an inclusive educational environment for each sector of the society. Function of religions is to promote certain views and argue its supremacy, and it they antagonistic to other religions. Therefore, performance of the public function by a religious orga-

41 Norman Doe, Law and Religion in Europe, Chapter: Property and Finances of Religion, p. 178.
42 Law of France as of December 19, 1905, Article 2, Constitution of Romania, Article 29.5.
43 Norman Doe, Law and Religion in Europe, Chapter: Property and Finances of Religion, p. 182.
44 Hungary: LFCRC 1990, Art 19.1.
45 Norman Doe, Law and Religion in Europe, Chapter: Property and Finances of Religion, p. 177.

nization for ensuring access to education would create an exclusive environment.[46] Apart from this, in spite of the fact that the state should not evaluate the content of religious doctrine, in case of its discriminatory nature, e.g. if it preaches obedience of women, the state should not delegate an authority, allocate resources to an organization when it enables it to strengthen such ideas. This would be contrary to the goal of creation of inclusive environment and administration of public sovereignty.[47]

6. INDIVIDUAL AUTONOMY OF RELIGIOUS COMMUNITIES AND ITS MEMBERS

Individual autonomy of religious communities and its members is the second aspect of a secular state, the one free from religious influence. It implies setting the religion and its followers free from the state interference in their activities and enabling them to perform their doctrinal goals independently. The primary expression of this is a prohibition of evaluating the religion's legitimacy by the state.[48] The European Court of Human Rights negatively assesses the role of the state "to remove the cause of tension by eliminating pluralism"."[49]

In the case of *Izzettin Dogan and Others v. Turkey* examined by the European Court of Human Rights concerned the non-recognition of the religious nature of Alevi faith expressed in the lack of access to the certain privileges. The court explained that considering the autonomy of a religious group, only high religious leaders and not the states or courts could determine which belief a community belonged. In such circumstances, the lack of consensus inside a community on certain principles was irrelevant.

In the case of *Fernandez Martinez v. Spain* the court found the right of religious organization to restrict its members from advocating different positions on religious doctrine, namely views against celibacy as protected under autonomy of the church envisaged by the Convention and did not find a

46 Peter Jones, "Religious Belief and Freedom of Expression: Is Offensiveness Really the Issue?," *Res Publica* 17, no. 1 (2011): 88.
Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, Mass.: Harvard University Press, 2014), 130.
Silvio Ferrari, Rinaldo Cristofori, and International Consortium for Law and Religion Studies, eds., *Law and Religion in the 21st Century: Relations between States and Religious Communities* (Farnham, Surrey ; Burlington, VT: Ashgate Pub, 2010), 216.
S. Parmar, "The Challenge of 'Defamation of Religions' to Freedom of Expression and the International Human Rights System," *EUROPEAN HUMAN RIGHTS LAW REVIEW*, no. 3 (2009): 6.

47 András Sajó, Constitutionalism and Secularism: the Need for Public Reason, pg.19.

48 Metropolitan Church of Bessarabia and others v. Moldova (ECtHR 2001): at 117.

49 Metropolitan Church of Bessarabia and others v. Moldova, (ECtHR 2001): 116.

violation when a teacher was dismissed by the state based on the motion of the Catholic Church. The court pointed out that in case of doctrinal or organizational dispute inside a religious organization, a person's religious freedom was realized by his/her right to leave the religious organization.[50]

In numerous cases, there is a close correlation between the guarantees of religious freedom of an individual and autonomy of religions itself. A good example of this is the decision delivered by the Supreme Court of Sweden in one of its cases. The Supreme Court found that the use of a homophobic language by a religious leader based on the biblical positions was protected provided that this did not include incitement to violence of the parish.[51]

Based on the analyses of these cases, the goal of protecting religious autonomy, namely creating space for independent operation of religious organizations is identified.

Guarantees for freedom of religion and belief also implies the freedom of an individual to stay loyal to their own views, in other words, the state shall not to force them to deny their faith by imposing certain obligations and the requirement to fulfill them.

An example for an autonomy of an individual related to their religion/faith is a right of pacifists to conscientious objection, in the form of refusing military service, universally recognized, including within the framework of the Constitution of Georgia.[52]

When interpreting the right to conscientious objection, the US Supreme Court in the case of *Burwell v. Hobby Lobby Stores* took the unprecendented step, interpreted it broadly and made it applicaple to the family type (closely-held) business as well. Individuals standing behind the business had a conscientious objection against the law, which obliged them to cover certain contraceptives by the insurance plans offered to their female employees, found by the court to be protected under the scope of freedom of religion.

The European Court of Human Rights in the case of *Darby v. Sweden* pointed out in respect to forced taxation that the state is obliged to respect views of individuals and not to force them to participate in financing religious goals.[53] This right of conscientious objection toward attributing

[50] see also the cases of Obst v. Germany (ECtHR 2010), Sindicatul "P storul cel Bun" v. Romania (ECtHR, GC, 2013).

[51] Ake Green case, Supreme Court of Sweden, András Sajó, Constitutionalism and Secularism: the Need for Public Reason, pg. 23.

[52] Bayatan v. Armenia, Decision of the Constitutional Court of Georgia as of December 22, 2011.

[53] Similarly, the Supreme Court of the United States pointed out in one of the cases (Everson v. Board of Education of the Township of Ewing) that no tax should be imposed on a person despite its amount if it is used to finance religious activities or institutions regardless of its form.

confessional goals of any of the religions to a state[54] belongs to many, is collective and nothing more that the manifestation of the principle of secularism itself.

Just as the state's secular politics has its margin namely that it should not imply a full release of the public space from religion, autonomy of religious organization as well as religious individuals, the right to lead their existence/life according to their will[55] is also limited. Thus, formal presentation of the arguments based on secularism or religion for the restriction of the activities of the state or a religious organization is unacceptable.

7. LIMITS TO FREEDOM OF RELIGION

7.1 Prohibition of discrimination, protection of the human rights, privatization of public space

It is obvious that the state's obligation toward prohibition of discrimination and protection of human rights cannot depend on the opinions of the religious organizations or persons. Otherwise, religion would stand above the law and the rule of law just would not exist. Refusal by the state to perform its function is permissible only when an individual, without the state's interference, can avoid discriminatory treatment or restriction of rights. Example of this is the case of *Fernandez Martinez v. Spain* discussed above, according to which in case of discrimination inside a religious organization, the state stands beyond autonomy of the church.

In contrast, in the case of *Eweida and others v. the United Kingdom*, the court did not consider the religious motives of the two applicants rejecting the services of, in the first case, performing civil marriage and, in the second, providing marriage counselling to the same-sex couples based on homophobic grounds. The applicants had been dismissed from their jobs because of the given discriminatory treatment, which, despite religious motivation of the treatment, was found to be admissible.

The logic of the case is shared by the Supreme Court of the United States in the case of *Bob Jones University v. United States,* in which the court considered the state's refusal of granting certain privileges (exemption from income tax) to those religious universities, which banned interracial dating justified.

---

[54] See the judgment of the Constitutional Court of Georgia as of February 26, 2016.

[55] John Rawls, *A Theory of Justice*, Rev. ed (Cambridge, Mass: Belknap Press of Harvard University Press, 1999), 10. John Rawls, "The Idea of Public Reason Revisited," *The University of Chicago Law Review*, 1997, 784.

The decision of the Labor Tribunal of the United Kingdom in the case of *Mbuyi v. Newpark Childcare, Ltd* is also interesting. In the case, the complaint of the citizen about ungrounded dismissal from work was upheld when the dismissal followed the sharing of her religious opinions against homosexuality with her lesbian colleague.

The logic of the latter case is shared by the Supreme Court of the United States in the case of *Snyder v. Phelps*, in which the court protected the freedom of speech of the members of the church when they organized a manifestation on the street against homosexuality in parallel to the funeral of the soldier who died in Iraq.

Based on the analyses of the given cases, we can see the logic, according to which, when fighting against discrimination inside the church, the state cannot go beyond the limits of the autonomy of the church, while fighting against discrimination outside the church is the state's responsibility. At the same time, provision of guarantees for the expression of discriminatory views remains the state's responsibility, also.

Apart from the cases of discrimination, religious motives are unacceptable in cases of privatization of the public space by the religion. When the church intends, and is be in a real position, to interfere in the public space in a way that it will not leave space for the performance of state functions, the principle of militant democracy is invoked justifiably in order to maintain the rule of the law in the state.

In the case of *Refah Partisi v. Turkey* the European Court of Human Rights justified dissolution of the largest political party by the state as it aimed to give a statutory force to Sharia laws. In the case, the court found Sharia laws incompatible with the Convention[56] because of its discriminatory nature towards other religions, opinions about equality and homosexuality,[57] despite the fact that it was pointed out that the state should not evaluate the legitimacy of the faith according to the obligations of neutrality and impartiality.[58] There is only one possibility of compatibility between these two positions, namely evaluation of legitimacy of the religion by the state is prohibited until the religion unambiguously interferes in the public space and tries to privatize it. In this case, the court indicates that in case of exchange of the roles between the state and the church the principles cannot remain the same.

[56] Refah Partisi (The Welfare Party) and others v. Turkey (ECtHR, Grand Chamber 2003): at 123, Refah Partisi (The Welfare Party) and others v. Turkey (ECtHR Chamber 2001): at 72.

[57] Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford ; New York: Oxford University Press, 2009), 439.

[58] Refah Partisi (The Welfare Party) and others v. Turkey (ECtHR, Grand Chamber 2003): at 91.

When the interests such as fighting against radical (symbolic) expressions of a religion, not recognized at the constitutional level and not under the scope of any of the human rights, are given an unjustifiably great importance in case of Islamic headscarves, in the given case, we face an attempt from religion to privatize the public space using the political party. The two are substantially different and the latter goes beyond the permissible forms of relationship between the state and the church.

Just as privatization of the public space by religious organization, in concrete cases by religious party, is inaddmissable, it is also impermissible to give such a broad interpretation to freedom of religion, so that it results in imposing its views on others.

In the case of *Kalac v. Turkey,* nonrecognition of Turkey as a secular state became the reason for the dismissal of a person from the military service. The court pointed out that a person is not restricted from exercising his religion (prayer, Ramadan), though a soldier's behavior motivated by religion, non-recognition of secularism was contrary to the aims of the military service and violated the military discipline in this case.

In the case of C. *v. the United Kingdom,* the court did not find an individual's request permissible to force the state to implement the policy as acceptable for one person based on the autonomy arguments. . A pacifist applicant requested exemption from the general taxation system, as the funds were spent for the aims unacceptable for him. The court stated that the state could collect taxes for the military purposes (envisaged for ensuring security) and pacifists did not have a right to be exempted from taxation. Freedom of belief of an individual is realized by the conscientious objection against military service and cannot apply to force the state to implement pacifist policy.

In contrast to the above mentioned case of *Darby v. Sweden,* in this present case if the request of the applicant was upheld, we would face excessive influence of religion and belief on the performance of the state's function namely ensuring security. When the state is functionally separated from the performance of religious goals, forcing citizens to participate in the performance of confessional goals is in any event inconsistent with the principle of public sovereignty.

Thus, the limit of the autonomy of religious community and an individual, the right to lead their existence/life according to their will runs across the protection of human rights, equality and public space from privatization.

CONCLUSION: SECULARISM, OBJECTIVE CONDITION FOR COEXISTENCE AND THE MEANS OF ITS IMPLEMENTATION

Generally, political and legal phylosopy is not based on the presumption of confidence in state and vice versa, development of the science is founded on the contrary hypothesis.[59] The same deliberation should apply to the confidence in the religious organizations by the state.

The state should not have a pre-defined trust or loyalty, the latter necessary for the survival of the political party in power, toward religious community that has a significant resource to organize the parish for specific purposes.. The state can stay neutral while assessing the motives of a religious community even when remaining cautious in such a way as its caution is derived not from the content of religions but from the risks of its interference in the public space. However, it is important that such caution is balanced and the state does not become a victim of its stereotypes itself.

The secular state policy does not imply reduction of religion to the private sphere. Otherwise, secularism would itself appear as an exercise of atheism considering the natural closeness of secular values and atheism. Such approach would be inconsistent with the theory of "Public Reason" as according to it, the state can like any worldview, based on religion or atheism only equally.[60]

Arbitrary interpretation of secularism, identifying it with the principle hostile toward religions is inadmissible. Otherwise, the state itself becomes fundamentalist and tries to impose a coercive or hostile policy on its citizens. Secularism of France, *Laïcité* might be perceived as an ideology and its normativity, close association with it by the state might be inconsistent with the freedom of religion and belief.

Caution of the state and admission of religion in the public space should be limited by the interest of the protection of human rights and equality.

State's neutrality, which demands from the state to refrain from the assessment of the legitimacy and expediency of religious motives, is a means of realization of the autonomy of religious organization and an individual having conscientious objection. Interference in the religious autonomy

[59] Raymond Plant, "Religion, Identity and Freedom of Expression," *Res Publica (13564765)* 17, no. 1 (February 2011): 20.

[60] Julian Baggini, "The Rise, Fall and Rise Again of Secularism," *Public Policy Research* 12, no. 4 (February 2006): 204, 206–207.Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 68.

is justified only when the state implements "purely public" functions, protection of human rights, free from ideology and. Such might be acting within the frames of militant democracy, when, for instance, religion on its own refuses its autonomy and appears as a political party, sharply interferes in the public space and aims at its privatization. It is obvious, that privatization of the public space by one religion and leaving the others outside this space will cause a restriction of numerous human rights and from the outset will deprive such religious motives of the opportunity to be transformed in the form acceptable for everyone.

In so far as, the state's principal policy is necessary while protecting human rights and equality, the state's attitude should also be consistent when protecting all forms of expression of religion, including expression of a discriminatory opinion except when such expression is realized in other forms of restrictive actions toward others.

In fact, holding balance by the state between the caution necessary for "safe pluralism" and recognition of religious motives represents the logical framework of secularism, an essence of the goal to be reached by it. In the reality of, at first glance, vague content of "secularism", it is important to describe the goal for which it is a means of realization, rather than perceiving a secular state in the form of a state free from religion, as a goal in itself.

In other words, secularism is a precondition of an equal coexistence of the state and the church. The state and the church will coexist when the state compromises and interferes in the religion autonomy or/and in the private sphere of a religious person, only when it violates the rights of others, equality, or aims at full privatization of public space.

Presenting secularism in its logical framework in light of the cases discussed is just enhancing an opinion already existing in theory. According to that standpoint, recognition of religious motives is acceptable and even necessary, though for these reasons, it should be possible to translate them into the form understandable for everyone, which would be unacceptable in cases of disproportional restriction of human rights, violation of equality and privatization of public space.

TAMAR GEGELIA
PhD student at Caucasus University Law School,
Guest lecturer at Ilia State University.

PROHIBITION OF UNCERTAINTY OF THE LAW IN CONTEMPORARY CRIMINAL LAW

ABSTRACT

Legal certainty requirement is the embodiment of the principle of legality and plays an important role in terms of criminal guarantee function, which on its part is of fundamental importance to individuals, so that they could foresee the prohibition and organize their actions. Uncertain norm bears the risk to of unjustified restriction of human freedom and the requirement of certainty is the guarantee to be protected from such restriction. This article aims to clarify the purpose and nature of Lex certa. Lex certa cannot establish requirement for absolutely certain provision, as the norm in its nature is abstract and often characterized by vagueness. Where the dividing line runs between allowed and disallowed uncertainty and how the line should be drawn will be the subject of discussion.

RÉSUMÉ

This article discusses the constitutional principle of prohibiting the uncertainty of the law and explains its meaning and objectives. General clauses are not considered to be in breach of Lex certa. Depending on the extent to which norm has a clear purpose and objective scope and the extent of clarity of the judicial interpretation, a dividing line is drawn between allowed and disallowed vague provisions.

This article analyzes the views expressed in court practice and scientific literature of various countries to draw a distinction between the inevitable vagueness and unacceptable uncertainty. In relation to the issue this article deals with tougher and more liberal interpretations and analyzes the risks characteristic to the latter. It also refers to a number of composition of crimes (conspiracy, incitement, etc.) which even though do not fall within the module of allowed uncertainty, still continue to operate and until today are the most common crimes. Therefore, this article is committed to introduce "sufficient certainty" – which is necessary and inevitable – instead of absolute certainty which is impossible in the real world. However the work also shares the trend for more and more expansion of the "allowed vagueness".

Among the legal principles that define the nature and content of the criminal law, the most important is the principle of legality, which is called "the first principle"[1] and also a "cornerstone"[2] of the criminal law. Characterization of the principle of legality with these words derives from the role it performs. An embodiment of the principle of legality is that there is no crime and punishment without law, which in Latin sound as follows: *nullum crimen/nulla poena sine lege*. Therefore, it is unacceptable to punish a person for conduct that did not constitute a crime at the time the conduct was committed and it is also unacceptable to render such a sentence, which was not provided by law at the time of commission of the crime. Thus, attribution of the guarantee function to the principle of legality is absolutely clear, because the State is bound by this imperative. It protects people from the arbitrariness and abuse of power by the state[3], guarantees to be informed in advance of the prohibition and a possible sentence[4]. Only in case of adherence with this rule it is possible to speak about the legitimacy of the punishment.

The principle of legality is the principle of constitutional rank in all the states of law, including Georgia, which is provided in paragraph 5 of Article 42 of the Constitution and the Criminal Code, it is given in the 2nd and 3rd Chapters[5].

1 Herbert L. Packer, The limits of the criminal sanction (California: Stanford University Press Stanford, 1968), 50.

2 Michel Rosenfeld Benjamin N., The Rule of Law and the Legitimacy of Constitutional Democracy, Southern California law review vol. 74 (2001), 1307; Nicola Lupo and Giovanni Piccirilli, The Relocation of the Legality Principle by the European Courts' Case Law. AnItalian Perspective, European Constitutional Law Review, Vol. 11, Issue 01 (May 2015), 56; M. Turava, General Part of the Criminal Law: The Doctrine of Crime (Tbilisi, Meridiani, 2011), 107;

3 Beth Van Schaack, Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals, The Georgetown law Journal vol. 97(2008), 122; Herbert L. Packer (1968), 50.

4 Richard H. Fallon, Jr., The Rule of Law" as a Concept in Constitutional Discourse, Columbia Law Review Vol. 97, No. 1 (1997), 7. Regarding the goals of the principle of legality see: Ibid. 7-9; Michel Rosenfeld, 1307; Herbert L. Packer (1968), 50.

5 The same guarantees are given in the international instruments on human rights, including Article 7 of the European Convention on Human Rights and Article 15 of the Covenant on Civil and Political Rights.

As it is known the referred maxim was used by the German scientist Anselm Feuerbach in 1801 in his writing[6]. Feuerbach linked the *nullum crimen sine lege* rule to crime prevention purpose and underlined the importance of the prior notification to the addressees on the prohibition[7]. As it was noted in many scientific papers, the principle of legality has a much older history and the basics of it are found in the old Greek philosophy[8]. Magna Carta of 1215 is also notable, which was embodiment of the separation of powers and binding the government by the law[9]. The significance of the principle of legality is credited as "revolutionary" since it had such function in the prevention of usurpation of the separation of powers and the government[10].

19th century is named as the period for proliferation and promotion of the principle of legality. However, the process started in the second half of the 18th century[11]. Nowadays, none of the states of law exist without this principle. It is contained in constitutions and criminal codes of all such countries. As for the Georgian criminal law history, the principle of legality was enshrined

6 M. Turava (2011), 107, footnote 2; Stefan Trechsel, Human Rights in Criminal Proceedings, editors: Konstantine Vardzelashvili, Lali Papiashvili and others, translators: Vano Gogelia, Eka Lomtatidze and others (Tbilisi, 2009), 135; Devin O. Pends, Retroactive law and proactive justice: Debating crimes against humanity in Germany 1945-1950, Central European History 43 (September 2010), 439; Beth Van Schaack, (2008), 121 note 1; Markus D. Dubber, The Legality Principle in American and German Criminal Law: An Essay in Comparative Legal History (December 1, 2010), 16; Markus D. Dubber and Tatjana Hornle, Criminal law: A comparative approach (Oxford: Oxford University press, 2014), 72.

7 O. Pends(2010), 441; Giorgi Khubua, The Theory of Law (Tbilisi, Meridiani, 2004), 426.

8 Jerome Hall, General Principles of Criminal Law. Second Edition (1960), 59; Constitutional Law-Fair Warning of Retroactive Law Is Sufficient Compliance with the Ex Post Facto Clause-Do b Bert v. Florida, BYU Law Review, Volume 2(1978), 485; Allen Francis A., The habits of legality: criminal justice and the rule of law (New York: Oxford University Press. 1996), 3; Brian Z. Tamanana, On the rule of law: History, Politics, Theory 7 (Cambridge Univ. Press 2004), 7-10; Beth Van Schaack, (2008), 121. Note 1; Ricardo Gosalbo-Bono, The Significance of the rule of law and its implications for the European Union and the United States, University of Pittsburgh law review Vol. 72 (2010), 232-240; Markus D. Dubber (2010), 2; Joel Samaha, Criminal Law, ed. LindaSchreiber-Ganster, 10th edition(Belmont: Wadsworth Cengage Learning, 2011), 40; Michael Faure, Morag Goodwin and Franziska Weber, The Regulator's Dilemma: Caught between the Need for Flexibility and the Demands of Foreseeability. Reassessing the Lex Certa Principle, Rotterdam Institute of Law and Economics (RILE) WorkingPaperSeries N 03 (2013), 25-27.

9 J. Samaha (2011), 40; M. Faure and others (2013), 25.

10 John M. Scheb and John M. Scheb II, Criminal law 5th edition (Belmont: Wadsworth, 2009), 47.

11 Allen Francis (1996), 4. The principle of legality was reflected in 1776 constitutions of Virginia and Maryland, while it was enshrined within the French Constitution in 1791 and in the Constitutions followed within next years, while it was reflected in the Criminal Code in 1810; See Devin O. Pends (2010), 442; Thomas J. Gardner and Terry M. Anderson, Criminal law 11th edition (Belmont: Wadsworth, 2012), 12. According to research regarding the principle of legality, it was reflected in the Criminal Code of Bavaria in 1813, which was written by Feuerbach. This was followed in 1814 by Oldenburg Criminal Code, Württemberg 1819 Constitution, the Grand Duchy of Hesse and Thuringia in March 1841 on the 1850 Criminal Code. This was followed in 1814 by Oldenburg Criminal Code, Württemberg 1819 Constitution, the Grand Duchy of Hesse 1841 and Thuringia the 1850 Criminal Codes. See: O. Pends (2010), 443-444.

only from the second half of the 20th century[12]. Soviet Union Criminal Law allowed for application of the law through analogy to the detriment of an individual which was explained by abstract threats and challenges. It was neglected and replaced by the principle of legality only by the Criminal Code of 1960.[13] The principle of legality protects citizens from arbitrary use of force by the state and is the guarantor for the protection of their autonomy[14]. The emergence of this principle in positive law is explained by the struggle against absolute power of the state, which followed the establishment of the principle of separation of powers.[15] Therefore, it is not surprising that in the 30-ies of the 20th century, during the totalitarian regime, Russia and Germany have negated the principle of legality[16], in order to give more flexibility to fight against ,,enemies of the people".

The arguments that justify the principle of legality are as follows: separation of powers between the government branches; unfairness of punishment for the conduct, which was not prohibited at the time of its commission and therefore, was not foreseeable for the addressee; protection of the citizens from the arbitrary and discriminatory justice[17]. Therefore, criminal law bears a **guarantee function** for citizens[18].

According to the common interpretations, a number of prohibitions derive from the guarantee function, such as:[19]

- Prohibition of application of the customary norm (Lex scripta);
- Prohibition of analogy (Lex stricta);
- Prohibition of uncertainty of law (Lex certa);
- Prohibition of retroactive effect of law (Lex praevia).

---

12 O. Gamkrelidze, Interpretations of the Criminal Code of Georgia, editor Merab Turava, 2nd revised edition Tbilisi: 2010), 78.

13 G. Nachkebia, Criminal Law – The General Part, Editor Irakli Dvalidze, (Tbilisi: Inovatsia, 2011), 83-84; M. Turava (2011), 108.

14 I. Vesels and V. Boelke, General Part of Criminal Law, Crime and its Constitution, editor Irakli Dvalidze, translator Zurab Arsenishvili (Tbilisi: Tbilisi University, 2010), 18; Shahram Dana, Beyond retroactivity to realizing justice: A theory on the principle of legality in international criminal law, Journal of Criminal Law and Criminology, Vol. 99, No. 4 (2009), 862; Schaack, (2008), 121-122.

15 S. Dana (2009), 862-863.

16 Allen Francis, 16; M. D. Dubber and T. Hornle (2014), 100.

17 John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Virginia Law Review 189 (1985), 201.

18 M.Turava (2011), 107.

19 S. Dana, 864-865; O. Pends (2010), 1945-1950, Central European History 43 (September 2010): 428-63; M. Faure and others (2013), 44-46; Beth Van Schaack, (2008), 121-122; M.Turava (2011), 109; I. Vesels and V. Boelke (2010), 18-22; M. D. Dubber and T. Hornle (2014), 73.

In addition to the above prohibitions, the Anglo-American criminal law doctrine provides for strict construction – the requirement that are directed to judges and means that in each case of vague legislation, out of many possibilities the law shall be interpreted in favor of the defendant.[20] We can say that this is more a stringent requirement than the prohibition of analogy of a ban but several studies have shown that it is rarely done in practice[21].

Based on the principle of legality, the above-mentioned prohibitions (Lex certa, Lex scripta, Lex stricta, Lex praevia) collectively serve the guarantee function of the law, which provides legal security for human beings. Precisely the certainty of law, the quality of its foreseeability and its availability was explained in light of the legal security by the Constitutional Court of Georgia (hereinafter the CC) and emphasized the importance of its protection[22]. Since this article aims to reveal one of the elements of the guarantee function of law – the legal certainty and to determine its essence in the modern reality, the next chapter will be devoted to research and analysis thereon.

THE PRINCIPLE OF *LEX CERTA*

One of the embodiment of criminal law guarantee function is the legal certainty principle or, as it is often referred to today, the requirement of "maximum certainty"[23], which means that the law must be a "reliable source"[24] for citizens and it should not cause their *post factum* fair surprise.[25] Demand that the norm shall be clearly formulated derives from the requirement of the constitutional significance that the norm addressees shall in advance have an idea about the prohibition in order to be able to "plan their actions"[26] and establish its compliance with the law.[27] This in turn is guarantor for their liberty[28] (in many countries where the death penalty is

20 J. C. Jeffries (1985)189; M. D. Dubber and T. Hornle (2014), 73.

21 Such a requirement has no formal basis in Georgia, also in Germany as noted by Dubber. See: M. D. Dubber and T. Hornle (2014), 100.

22 CC Ruling N1/3/407 dated 26 December 2007, II, 11; CC Ruling №1/2/503,513 dated 11 April 2013, II, 25.

23 Andrew Ashworth, Principles of Criminal Law, 6th ed. (New York: Oxford University Press, 2009), 58;

24 N. Gvenetadze and M. Turava, Decision-Making methods on Criminal Cases, editor: N. Dzidziguri, (Tbilisi, Association of Judges of Georgia, 2005), 33.

25 The term – fair surprise is used by Jeffries, see page 231; also by Herber Pecker, see page 53.

26 On the significance of *ex post facto* prohibition including in terms of certainty of the norm see: Weaver v. Graham: 450 U.S. 24 (1981); Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966); City of Chicago v. Morales, 527 U.S. 41, 58–59 (1999).

27 Explanations on importance of the legal certainty is provided by the Constitutional Court of Georgia as well. See the Ruling N2/2/389 date 26 October 2007.

28 The importance of the certainty of the norm was explained in light of the proportionality principle by the Constitutional Court of Georgia. See the Ruling N1/3/407 dated 26 December 2007, paragraphs 11-12.

still in force) and right of ownership, which will not be subject to arbitrary restriction by the state[29].

According to the explanations of the CC, the obligation of the legislator to make law foreseeable so that the addressee be able to adequately understand it derives from the principle of the state of law[30]. Ronald Dworkin thinks that a vague provision jeopardizes freedom, because individuals may assume the risk and take any step that might be prohibited by the norm or, conversely, to refuse to act on what is protected by the freedom guaranteed under the Constitution.[31]

It is correctly believed that the vague provision creates the danger of a seizure of power, which is damaging to the principle of the separation of powers. Vague provision allows the Court to create a new crime, which in turn creates the danger of oppressive and unjust justice.[32] It is a considerable thought that vague norm is a disrespect towards the citizen's autonomy, because the latter has the right to know in advance about the prohibition.[33] Vague norm creates threat in other areas as well; practice has repeatedly confirmed that such norms give impetus to discriminatory criminal policies and law enforcement[34].

A modern Georgian example[35] of unconstitutional uncertain provision is the composition of the conduct provided under Article 255 of the Criminal Code (Illegal making or sale of a pornographic work or other items) and conviction of an individual on the basis of this norm[36] in such a normative

29 Joel Samaha (2011), 41-42; Paul H. Robinson, Far warning and fair adjudication: two kinds of legality, University of Pennsylvania law review. Vol. 154 (2005), 359-360; Encyclopedia of crime and justice. 2nd ed. Vol 1. Ed. Joshua Dressler (New York: Macmillan Reference USA, 2002), 287; J. M. Scheb, (2009), 59. For different views please see: Peter K. Westen, Two Rules of Legality in Criminal Law, Law and Philosophy, Vol. 26, No. 3 (2007), 293.

30 See the Ruling N2/2/389 date 26 October 2007, paragraph 1; Ruling N 2/2/516,542 dated 14 May 2013 paragraphs 29-30.

31 R. Dworkin, Taking rights seriously (Delhi: Universal Law Publishing, 1999), 221. The similar view is expressed by Rawles. See: John Rawls, A Theory of Justice (Harvard University press, 1999), 210; Also see: T. J. Gardner and T. M. Anderson (2012), 19. In terms of significance of the legal certainty see: Meir Dan-Cohen, Decision rules and conduct rules, an acoustic separation in criminal law, Harvard Law Review, 97 (1983), 658-664.

32 R. Gosalbo-Bono (2010), 231.

33 A. Ashworth (2009), 75; Francis A. Allen (1996), 14.

34 P. H. Robinson (2005), 366; Jeffries, 218; S.H. Kadish, S.J. Schulhofer and C.S. Steiker, Criminal law and its process (New York: Aspen publisher, 2007), 161-164; John Rawls (1999), 211; Also see: Papachristou v. City of Jacksonville 405 U.S. 156 (1972).

35 The example for declaring the norm unconstitutional because of uncertainty in Georgian practice is the definition of espionage provided under Article 314 of the Criminal Code – the Constitutional Court recognized the phrase "or of the foreign organization" as unconstitutional. See the ruling of the Constitutional Court of Georgia N 2/2/516,542 dated 14 May 2013. For similarity see the case of State v. Metzger 319 N.W.2d 459 (Neb. 1982); For analysis see J. Samaha (2011), 44-45.

36 Ruling of Tbilisi City Court N 1/2684-15 (15 June 2015) and N1/2316-15 (14 May 2015). The Court in these cases did not talk about what was meant under illegality of spreading pornographic work and rendered a guilty judgment without providing any reasoning.

reality, where there is no regulation for issuance and sale of legally made pornographic work[37]. Under these conditions it is impossible to predict what the legislator meant with "illegal distribution" while it is silent with regard to the legality of the distribution. In such a case persons cannot be sure about the prohibition, nor will be able to organize their actions and in fear of not to commit the prohibited action may refrain from distribution of such information which is protected by the Constitution. There are numerous examples of vague norms in foreign countries' practice[38], among them **Rudy Stanko** case is noteworthy where a person was convicted on the basis of the rule prohibiting excessive speed driving on the highway. In order to denote the maximum speed limit the law applied such a vague definition as the **speed exceeding the reasonable limit, thus not setting clear limitations** for the addressee. The Supreme Court did not consider the norm as sufficiently certain norm and recognized it as unconstitutional. A good example for inevitably uncertain law was given in a case of **Ashlarba v. Georgia** (European Court of Human Rights)[39]. The applicant was accused of "membership of thieves' underworld", which was based on the Law on Organized Crime and Racketeering, Article 3, according to which the "thieves' underworld" is "any type of union of persons acting in accordance with special rules established/recognized by them...", while a member of the "thieves' underworld" is defined as "any person which recognizes the "thieves' underworld" and acts to achieve the aims of the thieves' underworld". According to the applicant, the norm was vague and lacked the foreseeability, which violated the principle of legality, according to which, the norm should be unambiguous and clear.[40] European Court of Human Rights, considering the historical background and the results of socio-legal research saw the wide nature of the mentioned norms in full compliance with the requirements of the legal certainty[41] and, therefore, no violation was found. Based on the studies the Court stated that "*this criminal phenomenon was already so deeply rooted in society, and the societal authority of "thieves in law" was so high, that among ordinary members of the public criminal concepts such as "thieves' underworld", "a thief in law", "settlement of disputes using the authority of a thief*

[37] On the compliance of the named norm with Article 42.5 of the Constitution please see the Constitutional Claim of Georgian Young Lawyers' Association N 657 (22 June 2015) and also Constitutional Claim by Giorgi Lolua N 711 (5 January 2016). Accessible at http://constcourt.ge/ge/court/sarchelebi, 26.05.2016.

[38] იხ. P. K. Westen, (2007), 249-250. Knuller v DPP, AC 435 House of Lords (1973); Shaw *v* DPP [1962] AC 220 57-60, 62, 468, 469. For the criticism of the named cases see: Ashworth (2009), 63 and Gabriel Hallevy, A Modern Treatise on the Principle of Legality in Criminal Law (Heidelberg: Springer-Heidelberg, 2010), 13. Compare: Jeffries (1985)189-246. On the prohibition of uncertainty of norm also see: T. J. Gardner and T. M. Anderson (2012), 22.

[39] Ashlarba v. Georgia N45554/08 (ECtHR: 15 October 2014); See the similar cases: Kokkinakis v. Greece N 14307/88 (ECtHR: 25 May 1993), para 40, 52; Also see: Steel and others v. The United Kingdom N 67/1997/851/1058, (ECtHR: 23 September 1998), პარ. 54, 55; Cantoni v. France N17862/91 (Strasbourg: 11 November 1996); Huhtamkai v. Finland, N 54468/09 (6 March 2012).

[40] Ashlarba v. Georgia, paragraphs 25 and 33.

[41] Ashlarba v. Georgia, paragraph 37.

in law", "obshyak", and so on, were matters of common knowledge and widely understood."[42] The Court explained that "*in any system of law, how clearly drafted a legal provision, including a criminal law provision, may be, there is an inevitable element of judicial interpretation.*"[43] There are cases where the Court used extremely dangerous interpretations in order to justify the eligibility of uncertain norms, as in the case of **Knuller**. The convicted published advertising in the British weekly magazine, where grown men were called to have sexual intercourse with him. This action was labeled as conspiracy that disrupted public morals and order by the Court of England. The convicted complained of qualification of the conduct as illegal, because the law on the basis of which he was convicted, in his opinion, was vague and did not allow him to act in compliance with it and therefore, in breach of the principle of legality. In that case the court interpreted its judgment as follows: "those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where he [sic] will fall in".[44] According to the mentioned principle, the person who intends to commit a specific crime, the wide boundaries of which he/she has been warned of, should also be aware that the margin between the illegal and the legal actions is so small that it is expected to cross such margins in the early stages[45]. British scholar A. Ashworth disagrees with the "thin ice" principle because of its wide boundaries and considers that the Knuller case decided on the basis of this principle violated the principle of legality.[46] The "thin ice" principle is assessed to have unjustly broad interpretation and to be a simplified technique of proof for the penalization of the conduct by Hallevy,[47] but despite the significant criticism expressed in the juridical doctrine the "thin ice" principle continues its operation, mostly the fight against crimes that are determined by criminal-political aims.

There are numerous opinions expressed in criminal law doctrine as well as in the philosophy of law why a person should not be punished on the basis of an uncertain norm[48]. The main point where these opinions meet is that uncertain norm violated the principle of the separation of powers[49], also that vague norm does not provide advance notification of the prohibition, and the individual has the right to know exactly for what he/she will be punished and what type of punishment to

42 Ibid, paragraphs 36-37 and 40.
43 Ibid, paragraph 34.
44 Knuller v DPP, AC 435 House of Lords (1973).
45 A. Ashworth (2009), 63. For the different opinion on the same issue see: John Calvin Jeffries, Jr (1985), 189-246.
46 A. Ashworth (2009), 63.
47 G. Hallevy, (2010), 13.
48 J. Rawls (1999), 208-209; Trevor W. Morrison, Fair warning and retroactive judicial expansion of federal criminal statutes, South California law review, Vol. 74 (2001), 455-459; A. Ashworth (2009), 69-70; Michael Jefferson, Criminal law (Halow: Pearson, 2013), 5-8. For critical views on the vicious sides of the vague norms see: Douglas Husak, Criminal law theory, The Blackwell Guide to the Philosophy of Law and Legal Theory (Beckwell: 2005), 108-111.
49 R. Dworkin (1999) 221-222.

expect[50]. Punishing individual on the basis of such an ambiguous provision which may have a different understanding, is considered as wrong and unconstitutional.[51]

In determining the certainty of law European Court of Human Rights and national courts apply "the average intelligence quotient" which implies checking how the norm would be adequately understood by any of its addressee having average intelligence[52]. In addition, international[53] as well as national courts[54] are reluctant to use absolute definitions, for example: instead of applying the term "absolutely certain", they use "sufficiently certain" or "reasonably foreseeable" and etc. which is considered as enough for determination of constitutionality of the norm.

According to the Constitutional Court of Georgia, "the law can be considered uncertain when all the methods have been tested to understand it, but its actual content is still unclear or the essence is clear, but its scope is vague"[55]. In another judgment the Constitutional Court underlined the importance of understanding the will of the legislator in order to determine the scope of the norm. To clarify the content of the norm the importance of interpretation of the General Court was emphasized and it was also noted that the controversial practice can be the ground for recognition of the norm as unconstitutional[56]. However, it did not happen so, when the Constitutional Court was hearing a case on the constitutionality of the criminal law provision that had retroactive effect. In the mentioned case it was contested whether Lex praevia applied to the new law extending the limitation period and abolishing the conditional sentence[57]. Despite the fact that the disputed provision could not uniformly be interpreted in practice and the judgments of the General Courts were not uniform as well, the Constitutional Court[58] still did not declare the norm

50 Oliver Wendell Holmes, The path of the law, Harvard law review10 (1897)457.

51 R. Dworkin, 221.

52 United States Supreme Court in 1926 case (Connally v. General Construction Co N 324 (1926) and later in 1931 case explained the test "the average intelligence quotient test" in order to determine the extent of certainty of a norm(United States Supreme Court MCBOYLE v. U. S., N. 552 (1931). The mentioned case was cited in various other Rulings of the Court in order to deal with the analogical issue. For example see: United States v. Lanier, 520 U.S. 259 (1997); also see: United States v. Cardiff, N. 27 (1952); Papachristou v. City of Jacksonville 405 U.S. 156 (1972); Kolender v. Lawson, 461 U.S. 352 (1983); City of Chicago v. Morales, 527 U.S. 41 (1999).

53 Kokkinakis v. Greece, N 14307/88 (ECtHR: 25 May 1993), para 40 , 52; Steel and others v. The United Kingdom N 67/1997/851/1058, (Strasburg: 23 September 1998), para 54, 55; Ashlarba V. Georgia, N 45554/08 (Strasburg: 15 October 2014); The Sunday Times v. The United Kingdom, N6538/74 (ECtHR: 26 April 1976); S.W. v. The United Kingdom, N 20166/92 (ECtHR: 22 November 1995).

54 Grayned v. City of Rockford N 46 Ill.2d 492, 263 N.E.2d 866 (1972); Kolender v. Lawson, 461 U.S. 352 (1983).

55 Ruling of the Constitutional Court N 1/1/428,447,459 dated 13 May 2009, paragraph II-19.

56 Ruling of the Constitutional Court N 1/2/552 dated 4 March 2015, paras 16-17.

57 Ruling of the Constitutional Court N 1/1/428,447,459 dated 13 May, 2009.

58 Ruling of the Constitutional Court dated 14 May 2013, para 36.

unconstitutional[59]. In another case, the Constitutional Court in order to determine the certainty of the norm attached importance to the objective borders of its interpretation. If the latter cannot be read in the provision, and it is subjective, which gives liberty to the law enforcers, such a provision is not considered to be sufficiently certain. In 2013, several items of espionage under the Criminal Code, in terms of compliance with the Constitution, has become a subject of discussion, including the applicant's claims – collecting or transferring foreign intelligence or other information to the detriment of the interests of Georgia – was not a reliable source of information, and thus it was a case of unconstitutional uncertainty. The Constitutional Court considered "collecting the other information" as sufficiently foreseeable, inasmuch as it is seen not in isolation, but in conjunction with "an act carried out under the order of foreign intelligence to the detriment of the interests of Georgia". The Constitutional Court also drew attention to the subjective composition of the act and considered that the boundaries of its objective sides in relation to "other information" and the subjective composition were sufficient to understand the norm[60]. The composition of espionage, which is in the chapter of crimes against the constitutional order and security of Georgia, of course, should be seen in light of threatening these universal good. Therefore, a rather general definition of the "other information" which is collected in order to damage the protected good, is in compliance with the Lex certa requirement and this was correctly referred by the Court. The prohibition norm was not reasonably interpreted, for example, in the case of *People v. Page*[61] – the case where a person was punished for the assault using the "dangerous weapon", while the accused used an edgy pencil as an instrument of assault. The dispute was about whether the pencil was in line with legislative definition of a "dangerous weapon" which was a qualifying circumstance. The court ignored the fact that "danger" is an imminent characteristic for such abstract threat action/aggravating circumstances, which is why they are criminalized as an abstract endangerment delict. **The danger is within the idea**[62]. For example, such an inherent sign is danger for firearms, but not for a pencil, which has a different function. Thus, we can say that in the case of California, the court ignored the objective of the norm's boundaries.

Thus, the prohibition of the application of a vague norm, which is meant under the *nullum crimen sine lege* principle[63], as the above analysis showed, does not imply absolute transparency, on

[59] See the separate opinion by Judge K. Eremadze on the Ruling N 1/1/428,447,459 dated 13 May 2009. On the same issue see D. Sulakvelidze, On the Retroactive Effect of Criminal Law Provision – Commentary to the Ruling of the Constitutional Court of Georgia and K. Eremadze, Answer to the Commentary by D. Sulakvelidze, Constitutional Court Law Review, N2 (2010).

[60] Ruling of the Constitutional Court of Georgia N 2/2/516,542 dated 14 May, paras 34-35.

[61] People v. Page 123 Cal. App. 4th 1466, 20 Cal. Rptr. 3d 857 (2004).

[62] N.Todua, Threat-creating Offenses according to the Criminal Code of Georgia, Justice and Law, N2-3 (2007), 153-156.

[63] J. Rawls (1999), 209.

which most scientists would agree, because for the norm, which is written in a normal language, uncertainty to a more or less extent is immanent[64]. H. Hart's position should also be shared that the world we live in, does not stand out with clarity, where all possible situations would fall within any foreseeable form; for such construction of the world the "mechanical jurisprudence" would be the most suitable, where everything is calculated and considered in advance[65]. According to the author, from the fact that the world is so diverse and the human imagination in understanding it – limited, the law is the way it is and in such a reality the general provisions are acceptable and inevitable. He also says that the uncertainty of the norm is the price to be paid upon the adoption of provisions of general character[66]. According to Hart, even the most certain norm has its own "penumbra" which, sooner or later, may arise in some situations. In order to overcome uncertainty it is important to correctly determine the objective of the norm, but he also adds that together with the social development a once-detected aim might need to be reconsidered[67]. According to R.H. Fallon, "aim" cannot be understood in isolation of the existing cultural and social life; it is not a historical fact, which has not changed and is waiting to be detected by any diligent researcher, but it is very complex and multifaceted concept that needs to be modified along with the change of time.[68] The dual nature of general provisions the so-called general clauses is discussed in the Georgian law literature, which on the one hand is considered as threat to the principle of separation of powers while on the other hand its useful nature is shown in terms of adjustment with the development of law and modern challenges[69]. According to J. Jeffries only then is the judicial interpretation of the norm an appropriation of the legislative authority, when it is done so against the clear will of the legislature, and when the norm cannot be understood and is not certain, its interpretation is "necessary" and the "inevitable" as well. Such an interpretation is called the "institutional function" of the court by the author[70]. Husak as well is not against the general definition. In his view, a general definition can be as wide as it is necessary to achieve the

64 There are lawyers who are for the admissibility of uncertain norm as well as lawyers for its strict (for example Ashworth) and more liberal interpretation (for example Jeffries and Westen) A. Ashworth (2009). Compare: P. K. Westen (2007), 276, footnote 80.

65 H.L.A.Hart, The Concept of Law (Oxford: Clarendon Press, 1982), 123-125. The same view is expressed by United States Supreme Court in a case of Grayned v. City of Rockford N 46 Ill.2d 492, 263 N.E.2d 866 (1972), where the court notes that the norm which is expressed with human language, cannot be mathematically precise, moreover, in a world which can not be recognized to the very end since the human imagination is limited. The referred decision is cited by Samaha, see: (2011), 43.

66 H.L.A.Hart, 125

67 Ibid. 112; The same view is shared by Robinson. See: P. Robinson (2005), 357.

68 R.H. Fallon, (1997), 13-14. Compare: Antonin Scalia, The Rule of Law as a Law of Rules, The University of Chicago Law Review Vol. 56, No. 4 (Autumn, 1989), 1183-1187.

69 Gvenetadze and Turava (2005), 32-34.

70 J.C. Jeffries (1985) 204-205; In Khubua's view, for the regulation of complicated and varied social relations the definition of the norm is acceptable and it is becoming increasingly important. See: Khubua, (2004), 152.

objective for which the conduct was criminalized and this should be the only means of achieving a legitimate aim[71]. As discussed above, the courts including European Court of Human Rights have several times explained that the so called general clauses per se momentum do not represent provisions unconstitutionally restricting the human rights and they can be "inevitably unclear". Fletcher's view is significant as well according to which the law does not have to become like fundamentalist understanding of a religious doctrine which does not looks towards the future and offers the norm that is understood once and for all. According to him, a lawyer resembles the religious fundamentalists which sacralizes law, creates something inalienable from it and exclude its understanding with momentum of the universal justice system qualified[72]. We can say that with respect to the allowed and disallowed ambiguity of the norm similar opinions are expressed in both Georgian and foreign academic circles and the judicial practice, some of which are characterized with more and some with less flexibility, but so it happens, that the norm is so uncertain that not fit any of the criteria referred to above but still continues its operation, which is, of course, is not a good example. Considering the criminal-political goals the agreed criteria expands even more and, therefore in order to assess "certainty" the further low standard is introduced. An example is the conspiracy which is criminalized under the legislation of the Anglo-American and some Continental European countries (Germany, Spain). Conspiracy is when two or more persons agree to commit an offense[73]. Therefore, for the conduct to be qualified as conspiracy a mere agreement to commit a crime without any further action is sufficient. According to the opponents of conspiracy in addition to the fact that criminalization of conspiracy is unjustified interference in the human freedom, it also fails to meet the foreseeability tests of the law, which leaves the prosecution with more opportunity of abuse[74]. Argument on uncertainty of conspiracy definition is directed to "agreement", what is meant under the agreement of two or more persons, and to illustrate the claim Dr. Benjamin Spock-'s case is recalled, where the pediatrician was charged with propaganda against the Vietnam War. The videotape, which was recorded during Benjamin's speech, showed applauses and ovations of hundreds of supporters. According to the prosecutor, all those people, who declared his support with the applause, had to be punished for conspiracy with Benjamin[75]. 1939 case[76] is recalled in the same context, in which 8 distributors of a motion

71 Douglas Husak, Overcriminalization – The Limits of The Criminal Law, (Oxford & NewYork: Oxford University Press, 2008),168.

72 George P. Fletcher, Basic Concepts of Criminal Law (New York: Oxford University press, 1998), 211

73 J. Samaha (2011), 259; Richard G. Singer & John Q. La Fonda, Criminal law – Examples and Explanations, Fifth edition (NewYork: Aspen Publishers, 2010), 340: Mike Molan, Duncan Bloy & Denis Lanser, Modern Criminal Law, 5th edition (London: Cavendish, 2003), 142; David Ormerod, Smith and Hogan Criminal Law: Cases and Materials, 10th edition (Oxford & New York: Oxford University Press, 2009), 536.

74 J. Samaha (2011), 259. R.G.Singer & J. Q. La Fond (2010), 340.

75 J. Samaha, Ibid; David B. Filvarofft, Conspiracy and the first amendment, University of Pennsylvania Law Review 2, vol. 121 (December 1972),190.

76 Interstate Circuit Inc. v. United States, 306 U.S. 208 (1939).

picture were held responsible for the conspiracy. In the named case the court viewed people's silence on the proposal to commit a crime as "agreement"[77]. The supporters of criminalizing conspiracy justify its need with modern challenges and high public interest reasons.

Despite the fair criticism of conspiracy, it still continues to operate and as the statistics show, is the most often punishable "act"[78] and especially powerful weapon in the fight against terrorism, white-collar crime and drug crimes[79]. In order to criticize the wide borders of conspiracy it is enough to mention that it is disclosed, as a rule, after the crime, to which the agreement was directed, takes place and the person is tried for two crimes – conspiracy and the crime towards which the agreement was directed[80]. Hence, the "legitimate aim" of the state to prevent particularly dangerous act at early stage of its detection cannot be reached and the conspiracy is used for other purposes[81]. Similar criticism goes to another type of an unfinished crime, in particular, the offense of incitement to commit a crime (solicitation), which is reflected in a futile attempt[82] to persuade the other person to commit a crime – with the promise, threat, order or other means[83], and this crime is finished from the moment the incitement is delivered[84]. In the 19th century, American courts have criticized the solicitation. The person was charged with one's futile abetting to commit adultery[85]; According to the judge in the named case, if a solicitation is an offense, then „... just nodding or winking to a married person" should be considered as a crime, which unjustifiably increases the scope of liability and also unjustifiably restricts human freedom[86]. Namely because of human freedom primacy and uncertainty of the prohibited act argument in various States of the US solicitation is not a punishable act[87]. However, it should be noted that in practice, according to studies, in some States of the US where the crime of

77 Encyclopedia of Crime and Justice, vol.1 (2002), 241-242.

78 R.G. Singer & J. Q. La Fond (2010), 340. 1st footnote.

79 Juliet R.A. Okoth, The Crime of Conspiracy in International Criminal Law (Kenya: T.M.C. Asser Press, May 13, 2014), 25.

80 Callanan v. United States, 364 U.S. 587 (1961); On this issue see: R.G.Singer & J. Q. La Fond (2010), 342. The same rule operates in England. See: Ruling of the Court of England in a case of DPP v. Stewart, 1982, 3 W.R.L. 884. On this issue also see: A. Ashworth (2009), 450-451; Julia Okoth, 21-23.

81 A number of studies have shown that mechanisms of punishment for both crimes is of principal importance, since it is a powerful weapon in the the hands of prosecution. If the prosecution fails to provide reasoning to the very end for the charges against the finished crimes, conspiracy will still remain a trump card. Thus, there are a series of procedural discounts provided for the charges of conspiracy, which has been successfully used in practice. For example, if as a general rule, the prosecution cannot establish the accusation on indirect testimony as it lacks confidence in the quality, which is generally required for evidence, such is admitted with respect to conspiracy. See: R.G. Singer & J. Q. La Fond (2010), 344-345; Encyclopedia of crime and justice, vol.1 (2002), 242; CMV Clarkson, HM Keating & SR Cunningham, Clarkson and Keating Criminal Law: text and materials, 6th edition (London: Thomson, 2007), 517, footnote 101. D. Ormerod, (2009), 534; J. Samaha (2011), 264.

82 J. Samaha (2011), 265

83 Race Relations Board v Applin, 1 Q.B.815, 825 (1973).

84 R.G. Singer & J. Q. La Fond (2010), 296-297; CMV Clarkson, HM Keating & SR Cunningham (2007), 534-535.

85 Even today in various States of the US marital infidelity is punishable under the criminal law.

86 Mathew Lippman, Contemporary Criminal Law: Concepts, cases, and controversies, second edition (California: Sage, 2010), 208. Also see the case of State v Butler, 8 Wash. 194; 35 P. 1093 (1894).

87 M. Lippman (2010), 208.

unsuccessful incitement is not punishable, for the criminal-political goals, the attempted crime is broadly interpreted and what in its nature does not exceed futile encouragement has proximity been qualified as an attempt to commit a crime[88]. In order to justify the above mentioned crimes even the "thin ice skating principle" cannot be applied because despite the broad interpretation, it is limited to crimes of particular social danger suppressing of which at a very early stage is explained with the objective need and warns the addressee in advance; as far as conspiracy and incitement to commit a crime is directed to all categories of crimes[89], it turns into not special, but rather the general rule, which unduly limits the autonomy of the person. Similar criticism goes to Article 18 of the Criminal Code of Georgia which criminalizes preparation of crime, however, despite the fact the "deliberate creation of conditions" for crime which is the legislative term for the preparation is rather a general definition, but given that the practice has shown the trend of interpretation[90] of its proximity with the attempt to commit a crime and the same idea is expressed in understanding the nature of the crime of criminal dogmatism[91], the general definition of crime preparation has to be justified in light of the diversity of the environment we live in.

Thus, it can be said that *Lex certa* provision does not imply formulation of the norm for casus-specific necessity. It covers the general definitions of norms the need of which is explain by life's diversity and the need to adapt the law to it. However, unequivocal answer to the question of where the line runs between the allowed and forbidden general compositions of crime does not exist because there is no mathematical formula that would solve all problems without checking first. However, it is also clear-cut that the absolute certainty of the norm is not achievable and the guarantee function of criminal law does not imply such an absolute provision but rather a sufficient foreseeability is meant under it. Shedding the provision to light and its correct application significantly depends upon the exact understanding of its purpose and also to on the norm's content. Also the provision can be considered as unconstitutionally vague which cannot be understood correctly, for which no tangible definition is found, that would help "the average reasonable person", even after the legal consultation, to adequately understand the norm, learn its scope. A number of such a vague definitions were cited in this article, and, among others is the composition of the crime provided in Article 255 of the Criminal Code the elements of which will soon become the subject of evaluation.

88 Ward v. State, 528 N.E. 2d (Ind. 1988).

89 D. Ormerod, 531; J. Samaha, 264 და 266-267; A. Ashworth (2009), 454. R.G. Singer & J. Q. La Fond (2010), 341. Some States are exception, for example in Kansas, Michigan and Colorado States incitement to fruitless felony is punishable. See: M. Lipmann (2010), 207. In Germany conspiracy is punishable only in the case if a penalty for the major offense is a minimum one-year sentence. See: J. Okoth (2014), 49.

90 See the Ruling N1-90-14 of Rustavi City Court Criminal Cases' Collegium ბბ. (10 October 2014); Judgment N1-92-11 of Rustavi City Court Criminal Cases' Collegium (7 June 2011); Tbilisi City Court Criminal Cases' Collegium Judgment N1/2045-12 (7 May 2012). For analysis see: Tamar Gegelia, Punishability of General Preparation of Crime (Comparative Legal Analysis), South Caucasus Law Journal N6 (2015), 169-180.

91 T. Tsereteli, Preparation and Attempt of Crime (Tbilisi, Georgian SSR Academy of Science, 1961), 88; O. Gamkrelidze (2010), 158-159; Ketevan Mchedlishvili – Hedrich, Punishability of Crime Preparation in Georgian Criminal Law in light of German Scholarly on Attempted Crime, Criminal Law Science in Single European Development Process, Criminal Law Science Symposium Collection 1, editor M. Turava (Tbilisi, 2013) 94.