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CONSTITUTIONAL COURT OF GEORGIA

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FOREWORD

In 2021, Georgia celebrates the 100th anniversary of its First Constitution. On 21 February 1921, the Constituent Assembly of the Democratic Republic of Georgia unanimously adopted the Constitution of the Democratic Republic of Georgia - a document with great historical, political and legal significance for our country. The 1921 Constitution was a remarkably progressive document that had fully kept pace with the European legal traditions of that time. A clear manifestation of the progressiveness of Georgia's first constitution was the fact that the 1921 Constitution guaranteed equality before the law, abolished the class distinction, ensured women's suffrage, abolished the death penalty and enshrined the principle of a secular state, as well as the rights of minorities and other fundamental civil-political and socio-economic rights. Particularly noteworthy is the drafting and adoption process of the 1921 Constitution, which was based on an in-depth, comprehensive study of the issue and the implementation of the best practices of the European traditions, and which was inclusive at the same time, bringing together all the political parties of the Constituent Assembly. The chronicle of the drafting and deliberation process of the First Constitution unequivocally shows the maturity of the Georgian political class. The historical-legal heritage of the 1921 Constitution is the basis of the state traditions of Georgia, as well as a precondition for its future development. The current Constitution of Georgia is based exactly on this heritage.

This present issue of the 'Journal of Constitutional Law' is a special edition, which is dedicated to the topic of the First Constitution of Georgia, namely, to the analysis of its normative substance and the understanding of its legacy. The publication combines ten academic papers by both Georgian and foreign authors. It is gratifying that the Journal presents the work of *Rainer Arnold*, a well-known European constitutionalist and Professor at the University of Regensburg, who analyses the normative-value foundations of the Constitution of the Democratic Republic of Georgia, its goals and objectives in the light of modern constitutionalism in his paper.

The Journal also includes the works of Georgian scholars on many issues essentially related to the First Constitution of Georgia, namely, to: understanding the values declared by the 1921 Constitution of Georgia through the prism of the United States Constitutionalism (authored by Mr *Irakli Kldiashvili*, Ph.D. candidate, University

of Connecticut), analysis of the basic principles – the national independence and individual freedom – that the 1921 Constitution was based on (authored by Professor *Malkhaz Matsaberidze*), deciphering some of the myths associated with the adoption and substance of the First Constitution (by Professor *Dimitri Gegenava*), thorough analysis of the state organisation model provided by the 1921 Constitution and its evaluation from the theoretical framework of the direct democracy (authored by Associated Professor *Vakhushti Menabde*), analysis of the factors that establish the Democratic Republic as an eternity clause and an unchangeable norm of the Constitution (by Mr *Paata Javakhishvili*, Ph.D. candidate at Tbilisi State University), analysis of the jurisprudence of the Constitutional Court of Georgia concerning social rights in the light of international tendencies established in the theory and practice of social rights (authored by Mr *Nika Arevadze*, Master in International Human Rights, Lund University), understanding the scope of the constitutional right to academic freedom in the light of the analysis of the legislation and jurisprudence of the Federal Republic of Germany, the United States and Georgia (by Dr *Revaz Khoperia*), the constitutional right to life in the context of climate change (by Ms *Ana Beridze*, Master in Environmental Law at Dundee University) and the assessment of the provision of the rights catalogue in the First Constitution – according to which the rights specified in the Constitution are not exhaustive - in the light of the current Constitution of Georgia (authored by Ms *Guliko Macharashvili* (Master of Laws) and Ms *Tamar Oniani* (Master in International Law)).

I hope that the present edition of the Journal of Constitutional Law will make a valuable contribution to raising awareness and facilitating research-based discussion about the 1921 Constitution of the Democratic Republic of Georgia, its legal and value heritage.

Professor **Merab Turava**

President of the Constitutional Court of Georgia

CONTENTS

Rainer Arnold[*]

CONTEMPORARY CONSTITUTIONALISM AND THE ANTHROPOCENTRIC VALUE ORDER – ON THE MODERNITY OF THE 1921 CONSTITUTION OF GEORGIA

ABSTRACT

Modern constitutionalism is based on a fundamental order of values centered on the human being: human dignity, freedom and equality. These anthropocentric values are functionally interrelated. The rule of law transfers these values to the sphere of the institutions, which must embody these values themselves and realize them in relation to individuals. A genuine constitution contains this order of basic values, whether in the written text or implicitly. These values are universal, at least in their functional core. Accordingly, modern constitutionalism is characterized by three essential tendencies: individualization, constitutionalization and internationalization.

The 1921 Constitution of the Republic of Georgia can be considered modern and in line with the essential standards of contemporary constitutionalism, especially with regard to its system of fundamental values.

I. CONSTITUTION AND CONSTITUTIONALISM

1. WHAT IS A CONSTITUTION?

In order to analyze the basic tendencies of contemporary constitutionalism, an attempt must first be made to define the essential relevant terms. This must begin with the term 'constitution', which forms the core of the legally non-fixed word 'constitutionalism', which only emerged in recent times. In other languages, such as German, the term 'constitution' is not semantically directly connected with that of 'constitutionalism', but it is obviously related in concept. Therefore, we must first try to clarify what is meant by 'constitution'.

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1.1. The Functional Concept of a Constitution and its Institutional-Organizational and Substantive Dimensions

There is no generally valid definition of the term 'constitution'. Linguistically, the terms for it vary in different languages. The term constitution, derived from the Latin '*constitutio*', is very widespread, i.e. the 'establishment' of a state, an order, the transformation of a free, basically unregulated society into an ordered, limited, precisely regulated state. Describing this with the considerations of *Jean-Jacques Rousseau*[1], this is the transition from a society, a group, a multitude of people into an ordered community. At the origin the 'free-born human being'[2] limits freedom through an agreement with the other human beings in order to establish an institutionalized community that functions for the benefit of all members. This agreed transition takes place through the 'social contract', the '*contrat social*'[3], in other words, through a 'constitution'. Its finality is thus, on the one hand, the establishment of an organized community with the aim of efficiently realizing the common good. This institutional-organizational aspect, however, is complemented by another objective that already exists from the outset: the restriction of the free-born human being should not result in unfreedom, it should maintain freedom instead, which is realized precisely in a restriction in favor of legitimate common good interests. Translated into modern constitutional language, the principle of freedom flowing from human dignity is, as interpreted by the German Federal Constitutional Court,[4] a 'community-related and community-bound' freedom and not that of an isolated, sovereign individual. Freedom is the principle and its restriction in favor of the common good is the necessary exception, which must be justified. The principle of proportionality is today's generally accepted instrument for determining the limit between freedom and the legitimate restriction of freedom.

Thus, if we define the term 'constitution' functionally, we can derive the two basic elements of a constitution from *Jean-Jacques Rousseau's* picture: the institutional-organizational dimension, the 'formal constitutionality', and the ideal, value-based dimension, the 'material, substantive constitutionality'. Both are an inseparable unity; the constitution is not only a formal organizational statute, but it is ideally purposeful. This *substantive dimension* of the constitution is a necessary consequence of the will of

[1] *Rousseau J. J.,* Du Contrat Social ou Principes du Droit Politique, 1762; Digital version by *Jean-Marie Tremblay* available at: <http://classiques.uqac.ca/classiques/Rousseau_jj/contrat_social/Contrat_social.pdf> (accessed 15.7.2021).

[2] *Rousseau J. J.,* Du Contrat Social ou Principes du Droit Politique, 1762, Livre I, Chapitre 1.1. Digital version by *Jean-Marie Tremblay* available at: <http://classiques.uqac.ca/classiques/Rousseau_jj/contrat_social/Contrat_social.pdf> (accessed 15.7.2021).

[3] *Rousseau J. J.,* Du Contrat Social ou Principes du Droit Politique, 1762, Livre I, Chapitre 6; See also Livre II, Chapitre 3. Digital version by *Jean-Marie Tremblay* available at: <http://classiques.uqac.ca/classiques/Rousseau_jj/contrat_social/Contrat_social.pdf> (accessed 15.7.2021).

[4] Judgment of the German Federal Constitutional Court of 20 July 1954 - BVerfGE 4, 7, 15-16, available at: <https://www.servat.unibe.ch/dfr/bv004007.html> (accessed 15.7.2021).

the free human being to form a community, in other words a consequence of the basic axiom of human dignity. The basic orientation of the constitution towards the human being is essential for today's concept of the constitution. This will be explained in detail later.

1.2. The Function-Related Real Definition of the Constitution and the Question of its Legal Definition

The definition of the concept of constitution, as it has been undertaken here, is based on the *function* of the constitution, i.e. it is a *functional reality-oriented definition*, not a mere *nominal definition*; the latter type, based purely on terminology, would not be appropriate, especially since, as already mentioned, the denominations for constitution show clear differences in the various legal systems. It should be remembered that terms are fundamentally created by a convention, i.e. by an 'agreement' between the person using them and those to whom they are communicated. The latter associate a certain understanding with the term which they have acquired through tradition and cultural environment as belonging to this term.[5]

The nominal designation of *constitution* or *basic law*[6] has no definitional meaning of its own, it merely makes clear that it is intended to create a set of norms traditionally associated with the term 'constitution'. Whether this is actually constitutional, depends on its functional structure. The constitutionality of these norms is only given if they satisfy the functions of a state basic order: the establishment of an institutional system and the determination of the anthropocentric value order, which consists of human dignity, freedom and equality, that is made binding for the institutions by the *Rule of law* concept.

In the view of this, it must be stated that there can be no *legal* definition of constitution, as the constitution is necessarily anthropocentric, i.e. it is linked to the anthropological

[5] For the concepts of the nominal and real (reality-based) definition, as well as to the communicative functions of terms see *Rüthers B., Fischer C., Birk A.*, Rechtstheorie mit Juristischer Methodenlehre, 11. Auflage, 2020, paras. 196-200, pp. 134-136.

[6] Moreover, the diversity of terms used in state practice (Constitution, Basic Law, Charter of Fundamental Rights, etc.) makes it difficult in any case to derive a clear definition from this, see e.g. Article 44 of the Federal Constitutional Law (B-VG) of Austria and *M. Pöschl*, Die Verfassung und ihre Funktionen, available at: <https://staatsrecht.univie.ac.at/fileadmin/user_upload/i_staatsrecht/Poeschl/Publikationen/Die_Verfassung_und_Ihre_Funktionen_-_onlinedatei.pdf> (accessed 15.7.2021); See also the Charter of Fundamental Rights and Freedoms of the Czech Republic, available at: <https://www.psp.cz/docs/laws/listina.html> (accessed 15.7.2021). The definitional usefulness of the designation as a constitution fails in a system such as Great Britain, where no formal constitution, as opposed to the European continent, exists and fundamental provisions of the state order are found in ordinary Acts of Parliament, that are in equal rank with all other pieces of legislation due to the principle of Parliamentary sovereignty, see *Greene A.*, Parliamentary sovereignty and the locus of constituent power in the United Kingdom, International Journal of Constitutional Law 18, 2020, pp. 1166-1200.

axiom of man; this fact cannot be changed normatively. Therefore, the legal norm cannot constitutively define the concept of constitution, at most it can confirm it declaratively. The legal norm can certainly not change this concept. Furthermore, it must be pointed out that the legal order is based on the constitution and is only constituted by it. The legal order, i.e. the constitution and the ordinary laws, cannot define something that is first created by what needs to be defined. The constitution-making power creates the constitution, it transforms factuality into normativity. In doing so, however, it is bound to the anthropological axiom, since it is the basis of facticity. The process of constitution-making is meaningful, it is meant to create a community of people (the organizational-ordering element) and is meant to realize the only adequacy of the human being, which lies in the anthropocentric order of values (the value-determining element).

As pointed out above, the definition of what a constitution is cannot be found in the legal order of the state, which cannot define its own basis. The international law and EU law cannot do this either, because they lack the competence to do so. However, they can make certain determinations for the constituent power of the states, since they are binding for the states. These binding determinations result from the international community for international law and, for the EU member states, they are derived from the EU.

As far as the values of a constitution, such as human and fundamental rights, are concerned, the observance of them is certainly prescribed by international, as well as by supranational law, that is clearly shown in Article 2 of the Treaty on the European Union. This results in a commitment on the part of the constitution-maker. In this way, extra-state law determines the value part of the national constitutions of the states. Nevertheless, the institutional part of the national constitution is not pre-determined by extra-national norms, except to the extent that the values also shape the structure and functioning of the institutions themselves.

2. THE CONCEPT OF CONSTITUTIONALISM AND CONSTITUTIONALIZATION

Constitutionalism denotes a state, a situation and *constitutionalization* is a process. Constitutionalism can express the commonalities and differences of the totality of constitutions globally or regionally. It indicates a legal-political state of 'constitutionality' of one or more systems. Constitutionalization refers to a process, the process of creating or expanding a constitution or the transfer of typical constitutional elements to certain areas of law (civil law, criminal law, procedural law, etc.) or to other legal systems. The term 'constitutionalism' can also be used to indicate the degree of constitutionalization of a legal system; this concerns, for example, the further

development of constitutional law through case law by the functional extension of the fundamental rights protection beyond the wording of the constitution, by differentiation of the *Rule of law* principle, by making unwritten parts of the constitution manifest in decisions or by integrating international influences, especially in the field of human rights, into the internal constitutional order. Constitutionalization can also mean that the written constitution in a system is expanded by constitutional amendments (for example, by introducing institutional constitutional jurisdiction, such as in Luxembourg[7]) beside the jurisprudential differentiation and perfection through case law.

3. CONSTITUTIONALIZATION OUTSIDE THE STATE - EU, ECHR AND THE INTERNATIONAL LEGAL ORDER

3.1. EU Law as a Functional Constitutional Order

Constitutionalism and constitutionalization are phenomena that also take place outside the state. Constitutionalization is even taking place primarily in extra-state processes, for example, with particular clarity in the development of the legal order of the EU into a functional constitutional order. In contrast to the domestic sphere, forms of international law predominate outside the state, treaties instead of the vertical exercise of power through norms, limited possibilities for sanctions, intergovernmental cooperation as decision-making structures, etc. The constitutionalization process consists of the creation, expansion and refinement of elements that are familiar from the national constitutional order, yet gain an autonomous character when adapted to the extra-state order. A significant example for this process is the development of the judicial fundamental rights in the form of general legal principles of Community law as early as the late 1960s by the European Court of Justice, which later found written expression in the EU Charter of Fundamental Rights.[8] Something similar can be said for the development of the elements of the *Rule of law* principle that was first established in national law, and later transformed into the supranational legal order as the principle of the *community of law*.[9]

If we continue to look at the European Union, significant constitutional structures are recognizable there. The European Court of Justice considered the primary law of the

[7] Constitution of Luxembourg and the Law on the Organization of the Constitutional Court of Luxembourg, Article 95 - La Loi du 27 juillet 1997 portant organisation de la Cour Constitutionnelle, available at: <http://legilux.public.lu/eli/etat/leg/loi/1997/07/27/n6/jo> (accessed 15.7.2021).

[8] *Williams A.*, Human Rights in the EU, in: *Arnull A., Chalmers D.* (eds.), The Oxford Handbook of European Union Law, 2015, pp. 249-270.

[9] *Skouris V.*, Demokratie und Rechtsstaat, Europäische Union in der Krise?, 2018, pp. 25-27; *Klamert M., Kochenov D.*, A Commentary on Art. 2 TEU, in: *Kellerbauer M., Klamert M., Tomkin J.* (eds.), The EU Treaties and the Charter of Fundamental Rights, 2019, para. 14.

Communities as constitutional law at an early stage[10]. It exercises, indeed, the same or at least comparable functions as a national constitution in the autonomous community order, which has been created by the transfer of national sovereign rights: it organizes a community composed of member states and individuals by means of institutions, instruments of action and cooperation mechanisms, and it determines the values common to this community, primarily in Article 2 of the Treaty on the European Union and in the EU Charter of Fundamental Rights. Fundamental rights protect individuals and are thus an essential feature of a constitutional order in the international sphere as well, since they have an essential normative reference to individuals, not to states. This is a consequence of the direct validity of supranational law in the internal legal order of the member states and thus of its legal effect also vis-à-vis individuals.

The constitutionalization of the supranational order was done by substantial recourse to the national constitutional systems and the ECHR, so that the concept of a *'European unit of fundamental rights'*[11] has come into being, as for instance the German Federal Constitutional Court has repeatedly referred to in its most recent case law, which shows a strong tendency towards convergence. This aspect of a functional connection with other European constitutional instruments also underlines the constitutional character of these supranational norms. In the area of fundamental rights, a transition from the international coordination structure to the vertical-individual conception of constitutional law is becoming increasingly apparent. The functional concepts of constitutional law and international law are converging significantly in this area and are to a large extent losing their own delimited meaning.

The fundamental structures of the supranational order, which have constitutional character in the functional sense, are either explicitly laid down in primary law or have been developed by case law. Early on, the European Court of Justice characterized the core elements of the special structure of the Community through its *Costa v. E.N.E.L.* decision of the European Court of Justice[12] in 1964: the autonomy of the Community legal order, created by the transfer of national sovereign rights, the direct validity and (if the conditions are met) direct applicability of this law in the member states and its primacy in the event of a conflict with national norms. These are the elements of the so-called 'supranational legal order', which is functionally, in a broader sense, also a

[10] Judgment of the European Court of Justice of 23 April 1986 - *Les Verts v. Parliament*, (294/83, ECLI:EU:C:1986:166), para. 23, available at: <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=92818&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=27907876> (accessed 15.7.2021).

[11] Order of the German Federal Constitutional Court of 6 November 2019 - 1 BvR 16/13 - BVerfGE 152, 152-215, English version available at: <https://www.bundesverfassungsgericht.de/e/rs20191106_1bvr001613en.html> (accessed 15.7.2021).

[12] Judgment of the European Court of Justice of 15 July 1964 - *Costa v. E.N.E.L.* (6/64, ECLI:EU:C:1964:66), available at: <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=87399&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=27907181> (accessed 15.7.2021).

constitutional order. Not without reason, the German Federal Constitutional Court has already spoken on the constitutional character of this legal order in early times; today, however, especially since the Lisbon decision in 2009, the court does not hesitate to use the term 'supranational' for the law of the EU,[13] but without explicitly equating it with the tem 'constitutional'. Instead, supranationality is equated with the new term 'association of states',[14] which is supposed to characterize the European Union as an 'intergovernmental' association founded by states that have remained sovereign, far removed from a European statehood. Basically, this sovereignty-oriented perspective of the German Federal Constitutional Court expresses its distance to the assumption of the EU legal order as being a functional constitutional order. The divergence of the German Federal Constitutional Court position from important supranational concepts of the EU, as developed and confirmed by the European Court of Justice, becomes visible: by claiming national competence to define the content of supranational law and its compliance with primary law, by limiting the primacy of EU law through (nationally defined) constitutional identity and by limiting the decision-making power of the EUCJ in preliminary ruling procedures[15] in this respect. However, this does not prevent the EU primary law, at least its fundamental principles and rules, from being characterized as 'functionally constitutional'.

The fact that the EU law itself avoids the term 'constitution' in order not to evoke associations with the failed Constitutional Treaty for Europe does no harm; what matters is the functional meaning of a normative structure and not its designation. For these reasons, the Treaty on the European Union, as the fundamental definition of the institutions and values of the Union, should therefore be clearly understood as a constitution. This also applies to the EU Charter of Fundamental Rights, which specifies in more detail the values fundamentally determined by Article 2 of the Treaty on the European Union. The fundamental normative provisions in the Treaty on the Functioning of the EU must also be assigned a functional constitutional character.

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[13] Judgment of the German Federal Constitutional Court of 30 June 2009 - BVerfGE 123, 267 (347-349, 356, 357, 361, 366), English version available at: <http://www.bverfg.de/e/es20090630_2bve000208en.html> (accessed 15.7.2021). The term 'Supranationality' has been repeatedly used by the German Federal Constitutional Court already in the Order of 18 October 1967 - BVerfGE 22, 293 (296-298), available at: <https://www.servat.unibe.ch/dfr/bv022293.html> (accessed 15.7.2021).

[14] For the concept of 'association of states' („Staatenverbund') see the Judgment of the German Federal Constitutional Court of 30 June 2009 - BVerfGE 123, 267 (348, 350, 379), English version available at: <http://www.bverfg.de/e/es20090630_2bve000208en.html> (accessed 15.7.2021). The concept was originally discussed in the Judgment of the German Federal Constitutional Court of 12 October 1993 - BVerfGE 89, 155 (181, 183-185, 188, 190, 207, 212), English version available at: <https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf> (accessed 15.7.2021).

[15] Judgments of the German Federal Constitutional Court: BVerfGE 89, 155 (188), available at: <https://www.servat.unibe.ch/dfr/bv089155.html> (accessed 15.7.2021); and BVerfGE 123, 267 (398, 399), English version available at: <https://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html> (accessed 15.7.2021).

3.2. The ECHR as a 'Constitutional Instrument of the European Public Order'

Let us take another look at the European Convention on Human Rights (ECHR); it too is described by the Strasbourg Court as 'constitutional law'. This is to be agreed with, especially because the fundamental rights in the constitutions of the signatory states are interpreted in the light of the rights of the Convention, i.e. they represent parallel guarantees at the constitutional level.

More specifically, the ECHR has to be classified in the category of constitutional law in the broader, functional sense for several reasons. These are substantive and institutional reasons: In terms of content, the rights contained in the Convention – similar to the rights of other international treaties - are typologically of a constitutional nature, since they concern the foundations of human existence and seek to protect them from encroachment by public authority. In this context, it cannot functionally matter that these encroachments, against which it is intended to protect, lie in state law, i.e. outside of international law as the legal order, to which the Convention belongs as regional international law. This is not the decisive aspect; rather, it is essential that the guarantees of the ECHR functionally reinforce and supplement the national constitution and substantially influence its content. This is connected with the guarantee character of the Convention.

The most recent case law of the German Federal Constitutional Court clearly indicates that the ECHR plays a special role in the 'European constitutionality bloc'[16] and decisively shapes both the Charter of Fundamental Rights of the EU and the constitutions of the member states.[17] Its influence on the development of fundamental rights within the framework of the EU was particularly significant and even under the existence of the written Charter of Fundamental Rights, it is an essential point of reference for the interpretation of a large number of EU fundamental rights.[18] The adaptation to the ECHR is also taking place for the fundamental rights of the German Basic Law and the other constitutions of the signatory states. In various constitutions, the obligation of the state organs to orient their understanding to those of the international instruments,

[16] The expression is based on the French term 'bloc de constitutionnalité'. *Favoreu L.,* Le principe de constitutionnalité: essai de définition d'après la jurisprudence du Conseil constitutionnel, in: 'Recueil d'études en hommage à Charles Eisenmann', 1975, pp. 33-48, reprinted in: *Favoreu L.,* La Constitution et son juge, 2014, pp. 539-554. See also the key decision of the Conseil constitutionnel of 16 July 1971 (71-44 DC), available at: <https://www.conseil-constitutionnel.fr/en/decision/1971/7144DC.htm> (accessed 15.7.2021). It shall be mentioned that the French term refers only to the legal sources of French law, different in time of origin and type of norm. Here the term is applied to sources of constitutional law from different legal systems. However, their interconnectivity is so close that they form a transnational functional 'bloc'.

[17] Decision of the German Federal Constitutional Court of 6 November 2019 - BVerfGE 152, 152-215, paras. 57 et seq., English version available at: <http://www.bverfg.de/e/rs20191106_1bvr001613.html> (accessed 15.7.2021).

[18] Charter of the Fundamental Rights of the European Union, Article 52.3, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> (accessed 15.7.2021).

in particular the ECHR, is expressly laid down, as for example in Article 10 para. 2 of the Spanish Constitution[19]; if such a clause is not contained in a constitution, there is still a tendency to adapt national fundamental rights by means of interpretation to the international standards, primarily to the instruments that belong to one's own closer legal cultural circle. As a result, it can be stated that the embedding of the ECHR in the European constitutionality bloc clearly underlines its functional constitutional character.

Another argument is certainly the individualization of access to court, which is atypical for the international system. This appears to be a consequence of the guarantee of human rights; thus, it is obvious to place the judicial assertion of rights that concern the individual in his or her own hands. But the very fact that in the (regional) international sphere disputes are not solved by political communication but by jurisdiction is, as *Jochen Frowein* has already pointed out,[20] a constitutional element. Certainly, the Court's self-assessment of the Convention as *'instrument constitutionnel de l'ordre public européen'*[21] is also important. Taken as a whole, the ECHR can be regarded as the decisive document for the protection of human rights and fundamental freedoms in Europe, which can undoubtedly be classified as functional constitutional law because of the close connection between national constitutional law and Convention law.

However, the designation as constitutional law must not lead to drawing legal consequences from this terminology alone. Formally, also from the perspective of German law, the Convention is an international treaty that has been transformed into the German legal order in accordance with Article 59 (2) of the Basic Law; according to this conception, which is characterized by the dualism of international law and national law, the ECHR in Germany only has the rank of ordinary federal law. However, it is in keeping with the importance of the Convention to place it on an equal footing with constitutional law and to base the interpretation of national fundamental rights on it. Even if Germany's fundamental commitment to international human rights expressed in Article 1 (2) of the Basic Law is an essential argument for the interpretative constitutionalization of the Convention[22], it is basically its constitutional significance that justifies such a step.

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[19] *Cámara G.V.*, La interpretación de los derechos y libertades fundamentales, in: *Balaguer F.C., Cámara G. V., López J.F.A., Balaguer M.L.C., Montilla, J.A.M.,* Manual de Derecho Constitucional, Volumen II, 15a edición, 2020, Cap. XVI, pp. 70-73.

[20] *Kaufmann A., Mestmäcker E. J., Zacher H. F.* (eds.), Rechtsstaat und Menschenwürde: Festschrift für Werner Maihofer zum 70. Geburtstag, 1988, p. 149.

[21] Judgment of the European Court of Human Rights of 18 December 1996 - *Loizidou v. Turkey* (15318/89), available at: para. 75, < https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58007%22]}> (accessed 15.7.2021).

[22] Decision of the German Federal Constitutional Court of 14 October 2004 (*Görgülü* case), paras. 32, 62, English version available at: <http://www.bverfg.de/e/rs20041014_2bvr148104en.html> (accessed 15.7.2021).

3.3. Constitutional Elements in the International Legal Order

Let us also take a look at international law, which, as is well known, traditionally only recognizes sovereign states as subjects and is therefore, by its nature, fundamentally a law of coordination. But here, too, various constitutional structures have been developed, which are related in particular to the fact that the human being has increasingly moved to the center of international law. Significant for this is the multitude of human rights protection instruments that have emerged in the meantime at the universal and also at the regional level. According to the conventional understanding, the individual is 'mediatized' by his or her home state; only to a very limited extent has the exceptional subjectivity of the individual under international law been recognized so far. Nevertheless, the basic idea of law, the relatedness of law to the human being, is increasingly gaining acceptance in international law. This is expressed in the strengthening of the position of human rights, namely in the fact that their violation does not only mean an offence under international law against the home state of the violated individual, but it also a violation of international law against the community of states. This *erga omnes* effect corresponds to the fact that the human rights guarantee constitutes mandatory international law, *ius cogens*, which cannot be waived by treaty, even with the will of all parties involved,[23] and is thus an objective-law requirement that must be observed by all, in other words, it has a 'constitutional' nature. The increasingly important position of the individual becomes even clearer in regional human rights covenants, such as the ECHR, whose violation by individuals can be complained of directly before the Strasbourg Court after the exhaustion of domestic legal remedies.[24]

In addition to the human rights obligations under international law, there are other very important obligations, such as the prohibition of the use of force - a prohibition that applies by treaty to the members of the United Nations and also as general customary law[25], as well as general principles of conduct such as the principle of good faith[26], the prohibition of the abuse of rights[27] and the principle of estoppel.[28] These are fundamental requirements that are part of the value-based constitution of the international legal order. All in all, we can conclude that even in the international legal order, which is fundamentally structured horizontally in terms of coordination law, more and more vertical-hierarchical elements are emerging that are constitutive of the structure and value of this order. These are functionally constitutional elements.[29]

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[23] *Wet E., Jus cogens* and Obligations *Erga Omnes,* in: *Shelton D.* (ed.), The Oxford Handbook of International Human Rights Law, 2013, pp. 541-561.

[24] European Convention on Human Rights, Articles 34-35, available at: <https://www.echr.coe.int/documents/convention_eng.pdf> (accessed 15.7.2021).

[25] *Krajewski M.*, Völkerrecht, 2017, § 9, paras. 18,19.

[26] *Arnauld A.,* Völkerrecht, 4. Auflage, 2019, para. 267.

[27] *Hobe S.*, Einführung in das Völkerrecht, 10. Auflage, 2014, p. 217.

[28] *Arnault A.,* Völkerrecht, 4. Auflage, 2019, para. 267.

[29] *Krajewski M.*, Völkerrecht, 2017, § 3, paras. 12-13.

4. SUMMARY OF THE TERMINOLOGY

After this terminological and conceptual analysis with reference to the national, supranational and international levels, the terms *constitution, constitutionalism and constitutionalization* shall be referred to again in a summary:

(a) *Constitution* is the basic legal order of a state, according to the traditional perspective, and consists of an organizational-institutional part and a value part, the fundamental rights. Formal constitutions are those that are formalized, written (even if they also have unwritten parts, often in important points), and often, but not always, integrated, codified in a single document (exceptionally in more documents). From the character of a constitution, as a basic order, results, on the one hand, that the fundamental institutional and ideal structures of the state are conjoined in the constitution (which, however, must be concretized and effected by laws) and, on the other hand, that this basic order forms the foundation of the legal order and is therefore necessarily hierarchically superior to the other norms. In addition, a basic order by its very nature should be permanent and can only be changed under difficult conditions.

(b) The term *constitutionalism*, which is frequently used today, is not clearly fixed. It can express various phenomena: firstly, the fundamental objective, the endeavor to create a constitution or to expand an existing constitution in its text (for example, new fundamental rights are inserted, such as the fundamental right to data protection or a fundamental right to environmental protection), or to intensify its function. Secondly, this term can express that a certain constitutional standard exists in a state or a group of states or in other systems (supranational legal order, international law). Often this term is used for comparative purposes with the aim of determining whether an advanced or still deficient constitutional standard exists in the area of comparison. This can be a historical retrospective or an analysis of current circumstances.

(c) The term *constitutionalization* refers to the process that leads to constitutionalism, be it through a transfer of elements known from the state constitutional order to extra-state areas, i.e. to supranational law or international law, or to other areas of the state legal order, such as private law, administrative law, etc. Generally speaking, it is a matter of adapting non-constitutional areas to constitutional structures, either organizationally-instrumentally or with a reference to values.

II. THE FOUNDATIONS OF CONSTITUTIONALISM

1.THE ANTHROPOCENTRIC BASIC APPROACH

What are the characteristics of contemporary constitutionalism? The answer to this question firstly requires a reflection on the anthropocentric basic approach of law. The reference point of law is and can only be: the human being. This human-centeredness

of law is axiomatic. The human being is an end in itself, it 'exists as an end in itself'.[30] Connected with the human being is its dignity that needs to be respected and protected by law.

The dignity of the human being, the recognition of the human being as a subject and the negation of its instrumentalization, is the supreme value in a legal order, regardless of whether it is written normatively or not; in any case, it is immanent to the legal order and thus also to the constitutional order. All partial purposes of the legal order must subordinate themselves to this supreme value and align themselves with it. Thus, the subject quality of the human being is determined as a central value; the human being shall not be made into an object and it must be granted the level of respect which is due to every human being for its own sake, by the mere virtue of being a person.[31] This is based on the idea that it is part of the essence of being human to determine oneself in freedom and to develop freely, and that the individual can demand to be recognized in the community as a member with equal rights and intrinsic value.[32]

Inseparably linked to the dignity of the human being is the principle of freedom. Without fundamental freedom, human dignity would not exist, just as human freedom presupposes human dignity. While human dignity is inviolable, i.e. cannot be restricted or weighed against other values, freedom, which is necessarily linked to equality, only exists to the extent that it does not call the equal freedom of other members of the community into question and recognizes legitimate community interests, which are basically a consequence of freedom and equality. The restriction of freedom in favor of the community is therefore inherently linked to the concept of freedom, insofar as this restriction is legitimate, necessary and proportionate. The supremely important principle of proportionality is the constitutional instrument for delimiting and linking freedom and equality. Man, born free (*Jean-Jacques Rousseau*[33]) is not an 'isolated sovereign individual', but a 'community-related and community-bound' personality.[34] This is the

[30] *Kant I.,* Kritik der praktischen Vernunft, 1788, first published by *Johann Friedrich Hartknoch* in Riga; later published by *Joachim Kopper*, Reclams Universal-Bibliothek no. 1111 (1961) - newly printed in 2019, p. 192.
[31] Decision of the German Federal Constitutional Court of 1 December 2020 - 2 BvR 1845/18, para. 61, English version available at: <https://www.bundesverfassungsgericht.de/e/rs20201201_2bvr184518en.html> (accessed 15.7.2021).
[32] Decision of the German Federal Constitutional Court of 1 December 2020 - 2 BvR 1845/18, para. 61, English version available at: <https://www.bundesverfassungsgericht.de/e/rs20201201_2bvr184518en.html> (accessed 15.7.2021), with reference to the Decision of the German Federal Constitutional Court of 21 June 1977 - 1 BvL 14/76 - BVerfGE 45, 187 (< 227 et seq. >), available at: <https://www.servat.unibe.ch/dfr/bv045187.html> (accessed 15.7.2021).
[33] *Rousseau J. J.,* Du Contrat Social ou Principes du Droit Politique, 1762, Livre I, Chapitre 1.1. Digital version by *Jean-Marie Tremblay* available at:
<http://classiques.uqac.ca/classiques/Rousseau_jj/contrat_social/Contrat_social.pdf> (accessed 15.7.2021).
[34] Judgment of the German Federal Constitutional Court of 20 July 1954 - BVerfGe 4, 7 (15, 16), available at: <https://www.servat.unibe.ch/dfr/bv004007.html> (accessed 15.7.2021); *Arnold R.* (dir.), La structure des droits fondamentaux - aspects choisis. La estructura de los Derechos fundamentales - cuestiones seleccionadas, Comparative Law Studies 12, 2021, p. 10.

conception of man that underlies the German Basic Law and corresponds in general to the essence of liberal-democratic constitutionalism, as the only true constitutionalism. The fundamental rights, whether written or unwritten, are specifications of the principle of freedom, which has substantial and functional efficiency.[35]

The principle of freedom implies a comprehensive protection of man against present and future dangers to his freedom; the protection of freedom, regardless of the written text of the constitution, is always comprehensive. In some constitutions, similarly to Article 2 (1) of the German Basic Law (GG), the general right to freedom is enshrined; in constitutions where this is not explicitly included in the text, this comprehensive right to freedom exists nevertheless as an inherent constitutional principle that is necessarily linked to human dignity. However, comprehensive protection of freedom does not mean the absence of restrictions at all; these are still permissible and necessary insofar as they also comply with the principle of proportionality. On the one hand, substantial efficiency of the fundamental right to freedom means that the fundamental rights, as mentioned, are objectively complete, and this regardless of their concrete written fixation. Securing the freedom of the individual is the inherent objective of every constitution, which must be guaranteed efficiently, i.e. comprehensively. This also means that the interpretation of fundamental rights must be as freedom-enhancing as possible, i.e. an interpretation oriented towards *effet utile*;[36] if a balance needs to be achieved between conflicting fundamental rights or constitutional values, then an optimal solution must be sought for all involved fundamental rights holders in the sense of practical concordance (as formulated by *Konrad Hesse*[37]). On the other hand, functional efficiency means that the restrictions on freedom are declared permissible by the constitution or formal law and they correspond to the necessary, legitimate interests of the community, i.e. fulfil the requirements of the principle of proportionality.[38] An important part of freedom is democracy, political freedom, which is encompassed by the above-mentioned principle. Without political self-determination, there is no freedom. The principle of democracy is part of the basic principle of freedom, thus it is also an outflow of human dignity. This was rightly stated by the German Federal Constitutional Court recently.[39]

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[35] *Arnold R.,* Substanzielle und funktionelle Effizienz des Grundrechtsschutzes im europäischen Konstitutionalismus, in: *Geis M. E., Winkler M., Bickenbach C.* (eds.), Von der Kultur der Verfassung, Festschrift für Friedhelm Hufen zum 70. Geburtstag, 2015, pp. 3-10.

[36] *Sudre F.*, Droit européen et international des droits de l'homme, 14e édition, 2019, pp. 245-248; *Potacs M.*, Effet utile als Auslegungsgrundsatz, in: 'Europarecht', 2009, pp. 465-487, available at: <https://www.europarecht.nomos.de/fileadmin/eur/doc/Aufsatz_EuR_09_04.pdf> (accessed 15.7.2021).

[37] *Hesse K.*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 18. Auflage, 1991, paras. 317 et seq.

[38] *Arnold R.,* El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional, together with *Martinez Estay J.I., Zuniga Urbina F.,* in: 'Estudios Constitucionales', 2012, pp. 65-116.

[39] Decision of the German Federal Constitutional Court of 30 June 2009 - 2 BvE 2/08, para. 211, English version available at: <http://www.bverfg.de/e/es20090630_2bve000208en.html> (accessed 15.7.2021).

Freedom is necessarily linked to equality; this has already been emphasized above. Prohibitions of discrimination on the basis of skin color, gender, origin and other characteristics, i.e. special manifestations of the principle of equality that are connected with being human as such, are a direct outflow of human dignity.[40] We can thus state that human dignity, freedom and equality are at the core of constitutionalism in general. They are essential elements of a totality called 'constitution' and are necessarily attributes of being human; they are to be called *basic anthropological value order*.

2. SECURING FREEDOM THROUGH ACTIVE PROTECTION - BENEFIT RIGHTS, FUNDAMENTAL SOCIAL RIGHTS AND THE RIGHT TO A MINIMUM SUBSISTENCE LEVEL

The principle of freedom, that we have talked about so far, does not only include securing freedom by refraining from an illegitimate interference with freedom by public power, but it also means securing freedom by *actively exercising protection*; this is where the concept of the state's duty to protect becomes relevant, i.e. the state's obligation to actively protect the values enshrined in fundamental rights, especially through legislation.[41]

The further question is whether benefit rights in the sense of *fundamental social rights* also fall under the principle of freedom. In any case, the protection of human dignity includes guaranteeing the minimum subsistence level of human beings.[42] Freedom must be understood more broadly than simply non-intervention. Elementary human needs must be secured insofar as the state is responsible for them. In a broader sense, fundamental social rights as rights to benefits, also belong to the concept of freedom. However, a constitutional order is free to either formulate basic social rights in the constitution[43] by prescribing a (often only vague) program to the legislature for the realization of these fundamental social rights, or, as in the case of the German Basic Law, assign

[40] *Arnold R.,* Human Dignity and Minority Protection. Some Reflections on a Theory of Minority Rights, in: *Elósegui M., Hermida C.* (eds.), Racial Justice, Policies and Courts' Legal Reasoning in Europe, 2017, pp. 3-14.

[41] See the most recent decision of the German Federal Constitutional Court on the Climate Protection Act, dealing with the state's duty to protect the fundamental rights values (among other issues) – Order of the German Federal Constitutional Court of 24 March 2021 - 1 BvR 2656/18, paras. 1-270, English text available at: <http://www.bverfg.de/e/rs20210324_1bvr265618en.html> (accessed 15.7.2021). As to 'positive obligations' resulting from the rights embodied in the European Convention on Human Rights see *Sudre F.*, Droit européen et international des droits de l'homme, 14e édition, 2019, p. 247.

[42] For this idea, which can be generalized, see the Judgment of German Federal Constitutional Court of 9 February 2010 - BVerfGE 125, 175-260, available at: <https://www.servat.unibe.ch/dfr/bv125175.html> (accessed 15.7.2021).

[43] *Iliopoulos-Strangas J.* (ed.), Soziale Grundrechte in den „neuen' Mitgliedstaaten der Europäischen Union, 2019.

the same function to a state provision of an objective character,[44] not to fundamental rights. Functionally, both are largely equivalent. Ultimately, it is an expression of good politics, i.e. good governance, to ensure that these needs are adequately met.

3. THE RULE OF LAW AS THE VALUE TRANSFER TO THE INSTITUTIONS

The question arises about the role of the *Rule of law* as a fundamental constitutional concept. The basic anthropological value order, as mentioned above, is a value orientation that is transferred to the organizational-institutional sphere of the state within the framework of the *Rule of law*. Institutions and procedures are the expression and realization of this value orientation. The assignment of legislative competences to the parliament is the realization of political freedom, which is made possible by a democratic electoral law. The definiteness of a law, especially insofar as it allows encroachments on freedom, is a necessary prerequisite for these restrictions and secures freedom.[45] The protection of legitimate expectations, the prohibition of retroactivity and proportionality[46] are also institutionalized safeguards of freedom. We can thus recognize the function of the *Rule of law* principle as a hinge between the fundamental constitutional values and the institutional realization of these values.

4. THE CONCEPT OF OPEN STATEHOOD

A further view must be taken of the concept of open statehood, which has meanwhile become entrenched in constitutionalism. Is it part of the basic anthropocentric relationship? As far as the rights of the individual are concerned, the answer is in the affirmative. National fundamental rights must be interpreted in the light of the international human rights guarantees. They can only be understood as a functional unit. The common point of reference is the human being; therefore, the interpretation of the national human rights is also shaped by the universal idea of human rights, which has concretizations in different legal systems. The protection of the human being is

[44] For example, Basic Law for the Federal Republic of Germany (GG), Article 20.1, available at: <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf> (accessed 15.8.2021).

[45] See as an example the very detailed provisions of the German Code of Criminal Procedure (StPO) on specific investigation measures with high relevance for privacy, e.g. para. 100b on 'covert remote search of information technology systems' and para. 100c on 'acoustic surveillance of private premises', English version available at: <https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0649> (accessed 15.7.2021).

[46] For these elements in German law see *Leisner W.G.*, in: *Sodan H.*, Grundgesetz, Artikel 20, 2018, paras. 58 et seq., 65 et seq. These elements can be found, in substance, also in other legal orders, due to their general character.

always comprehensive, since the finality of law is the protection of the human being. This finality cannot only comprise fragments, but should always be directed towards comprehensive protection and the totality of the purpose. In the field of values, open statehood means openness to the insights and objectives of the international community. Article 1 (2) of the German Basic Law expresses the modern idea of human rights that are not bound to territorial borders.[47] This results in an open understanding of human rights that is not bound to national perceptions.

5. THE FUNCTIONAL UNITY OF THE FUNDAMENTAL VALUES

The constitutional principles of human dignity, freedom, equality and the *Rule of law* form a 'functional unity'[48]; these values are inseparable. If only some of these values are written in the constitutional text, the others are implicit. This results from the common reference to the human being. Therefore, all of these fundamental values are essential components of a constitutional order, and this with universal validity. Since these values are intrinsically part of a constitutional order, this can only apply generally, i.e. universally.

6. DIFFERENT FORMS AND FUNCTIONAL CORE

It should be emphasized that these values, which are essential to a constitutional order, can also be structured differently in the various constitutional orders, as long as their functional core remains intact. This functional core, for example in the case of the protection of fundamental rights, is an efficient safeguard of the freedom of the individual, irrespective of whether the fundamental rights are conceived as subjective rights in a legal order or as objective principles to be implemented by the legislature first, similar to the program principles, as long as they protect freedom comprehensively and effectively. Political freedom can be realized through representative or (at least partially) direct democracy; what is essential, is that there is efficient political self-determination, which is reflected in the specific constitutional system.

7. THE NORMATIVE REALITY AND PERCEPTION

Since this basic relationship is linked to the human being and is intrinsically connected to it, it has general, universal validity. This human-oriented basic relationship as a

[47] Order of the German Federal Constitutional Court of 14 October 2004 - *Görgülü* case, para. 62, English version available at: <https://www.bundesverfassungsgericht.de/e/rs20041014_2bvr148104en.html> (accessed 15.7.2021).

[48] *Arnold R.,* L'État de droit comme fondement du constitutionnalisme européen, Revue française de droit constitutionnel, numéro spécial, 25 ans de droit constitutionnel, no. 100, 2014, pp. 769-776.

normative reality does not vary from region to region and is also not historically variable. This normative reality is not always observed, sometimes consciously disregarded, sometimes misunderstood, but sometimes correctly recognized. The perception must therefore be distinguished from this normative reality, i.e. the subjective understanding and the concrete normative or political implementation at a particular time and in a particular place. Indeed, normative reality and perception often fall apart, and this appears in minor points, but not seldom it also occurs in essential dimensions, especially with regard to the political evasion of the constitutional precepts.

8. THE COMPARISON OF LAWS AND SYSTEMS

Comparison of law is the comparison of legal orders, as they have been concretized in accordance with the (generally fixed) anthropocentric basic value order (above all the institutional concretizations, as well as value concretizations and non-value-related concretizations). Comparison of law is also the study of whether or not and to what extent the perceptions in the individual legal systems (i.e. the constitutional and statutory provisions, the judicial interpretations, the political implementations) correspond to the normative reality of the basic value order (i.e. to what extent the necessary elements of the value order, insofar as they are written, have been interpreted correctly and are in accordance with the normative reality, or, insofar as they are not written, whether they have been revealed correctly by the courts).

The examination of whether the perception (i.e. the written, jurisprudentially developed, legislatively shaped and politically implemented legal state) corresponds to the normative reality in the individual legal systems, is only an 'unreal' law comparison, because the object of comparison in its core, i.e. the anthropocentric basic order of values, is always the same, has universal validity and only the perception varies. The result of this comparison can be different: consistent, deficient (but worthy of improvement) or negating the basic order of values in one or more elements. In the latter case, there is no real constitution, but a mere statute of organization; in such a case, there would be no real constitutionalism.

9. THE SYSTEM-NECESSARY AND VARIABLE NORMS IN THE CONSTITUTION

It can be stated at this point that a concrete constitutional order contains two types of norms (principles, rules) that are essential, system-necessary, for a genuine constitution, i.e. for a liberal-democratic constitution, and those that are not, and therefore variable. For example, a determined form of territorial organization, federal statehood, regio-

nal statehood or (relativized) central statehood, is not directly relevant for the anthropocentric basic value order, not system-necessary, even if federal statehood means vertical separation of powers and therefore (among other aspects) represents an important guarantee for the Rule of law. A distinction can also be made between those norms that flesh out the essential values, but are variable in terms of content and form, using a margin of maneuver (within the framework of an efficient realization of the essential value), and those that have no relation at all to these essential values.

10. THE BASIC ANTHROPOCENTRIC VALUE ORDER AND ITS GENERAL SIGNIFICANCE FOR SYSTEMS WITH EXERCISE OF POWER ON INDIVIDUALS

The anthropocentric basic value order of human dignity, freedom and equality is not only relevant in the state, but whenever public authority can exercise power over human beings (directly or indirectly) or when the living conditions of human beings are essentially determined by one or more decision-makers, even if there is no such exercise of power. This can undoubtedly be stated for the area of the supranational order of the EU. However, the question of the relevance of the anthropocentric basic value order also arises for international legal relationships, such as the international legal order, in which the direct norm addressees are not individuals, but states as primary subjects of international law. Apart from the development of certain constitutional structures at this level already discussed above, the relevant safeguard lies here in the constitutional order of the states themselves which must implement international law norms. The national constitutions provide the guarantee for compliance with the values of the basic value order and are barriers against violations on the part of international actors. Anchoring these values in the national constitutions provides essential protection and also shows that the necessary orientation towards the basic value order also applies to the international legal order, at least indirectly via the national constitution which is binding for the states when they are implementing international norms.

III. TENDENCIES OF CONTEMPORARY CONSTITUTIONALISM - SOME BASIC ASPECTS

1. TENDENCY TOWARDS INDIVIDUALIZATION

1.1. The Connection of the Basic Tendencies

The contemporary constitutionalism is clearly characterized by its tendency towards individualization. Other main tendencies - constitutionalization and internationali-

zation[49] - cannot be distinguished in isolation from this, but are interconnected in many ways and are functionally related; they can, however, be described separately according to their emphases.

1.2. Conceptual and Institutional Dimension

The tendency towards individualization can be divided into a conceptual-material and an institutional-formal area. It corresponds to the anthropocentric foundation of constitutionalism when the human being, its dignity and freedom, are placed conceptually at the center of law, especially constitutional law. The main aspects of this basic anthropocentric value order belong to the area of individualization and are the central starting points for the entire understanding of contemporary constitutional thinking. The image of the human being as an individual related to the community, whose intrinsic value and thus subject status claims full recognition, is pivotal. The protection of the individual's freedom is intended by the constitution to be complete, be it in written or in unwritten form, and is a clear postulate of the constitutional order. Substantively and functionally, the efficiency of protection must be guaranteed. This means in particular: a comprehensive protection of freedom against present and future dangers; an interpretation oriented towards optimal effectiveness of protection, a functional safeguard especially against disproportionate encroachments and also the open orientation towards value developments at the international level, insofar as they mean reinforcement and further differentiation.

The conceptual emphasis on the fundamental rights of the individual also leads to the functional strengthening of the protection of an individual in numerous legal systems. The example of German law may explain this: the fundamental rights conceived as subjective rights of defense against state intervention have also been recognized as objective values that have significance for the entire legal order, i.e. for all areas of law including civil law (private law).[50] The radiating effect[51] attributed to the constitution is explained by the increasingly recognized primacy of the constitution as the supreme source of law in the state and is ultimately a consequence of the recognition of the special position of the individual. In addition, there is a further functional expansion step which has been already mentioned: the defensive, 'negating' function of the fundamental right, which is connected with the concept of the subjective right, becomes

[49] *Arnold R.,* Interdependenz im Europäischen Verfassungsrecht, Essays in Honour of Georgios I. Kassimatis, 2004, pp. 733-751.

[50] Judgment of the German Federal Constitutional Court of 15 January 1958 - 1 BvR 400/51 - BVerfGE 7, 198 (205-206), available at: <https://www.bundesverfassungsgericht.de/e/rs19580115_1bvr040051.html> (accessed 15.7.2021).

[51] Judgment of the German Federal Constitutional Court of 15 January 1958 - 1 BvR 400/51 - BVerfGE 7, 198 (205-206), see the term „*Ausstrahlungswirkung*', available at: <https://www.bundesverfassungsgericht.de/e/rs19580115_1bvr040051.html> (accessed 15.7.2021).

a constitutive structural feature of the entire legal order through the recognition of the value character of fundamental rights and then expands - as additional step - into a claim to performance for active, increased protection of the individual by the state. The entitlement to benefit is not the entitlement to financial support, at least not as a rule, but entitlement to state support through protection, on the one hand, vis-à-vis other private individuals (thus the horizontal duty to protect)[52] and, on the other hand, vis-à-vis the state itself, in that the fundamental right is unfolded, implemented and thereby promoted and protected through legislation.[53] This functional expansion of the fundamental rights was realized through case law and not through formal constitutional amendment or supplementation by constitutional reform, and it has demonstrated steadily progressing development over time.

International case law is often particularly significant for the individualization. For example, the case-law of the Strasbourg Court has initiated an extraordinarily important quantitative and qualitative advancement of the protection of fundamental rights in the member states of the Council of Europe and has widely disseminated the method of interpretation aimed at optimizing protection (and has also contributed to adapting the existing formal and thus restrictive interpretation for competences and the content of fundamental rights in Austria, thus modernizing it and making it adequate to the importance of the protection of fundamental rights).[54] The concept of duties to protect fundamental rights has also been strengthened and disseminated through Strasbourg case law.[55] The Charter of Fundamental Rights of the European Union has further strengthened the national protection of fundamental rights from outside the state. The international fundamental and human rights instruments are growing closer and closer together to form a common overall instrument with converging contents. This does not mean a fragmentation of the protection of fundamental rights at all, but rather it constitutes a strengthening. It also becomes clear to what extent the tendencies towards individualization and internationalization, both inherent tendencies of contemporary constitutionalism, are functionally linked to each other, mutually influence each other and, as a result, also strengthen each other. The international guarantee instruments also receive impulses from the national texts, as can be seen clearly from the genesis and also from the text version of the EU Charter of Fundamental Rights; the case-law

[52] *Arnold R.* (dir.), La structure des droits fondamentaux - aspects choisis. La estructura de los Derechos fundamentales - cuestiones seleccionadas, Comparative Law Studies 12, 2021, pp. 12-13.

[53] As to the „*Untermaßverbot*‘ - the expression for the state’s duty to protect the freedom in a way that is not insufficient, not less than to an adequate extent, see the Judgment of the German Federal Constitutional Court of 28 May 1993 - BVerfGE 88, 203 (254), English version available at: <https://www.bundesverfassungsgericht.de/e/fs19930528_2bvf000290en.html> (accessed 15.7.2021).

[54] *Pöschl M.*, Die Verfassung und ihre Funktionen, p. 4, available at: <https://staatsrecht.univie.ac.at/fileadmin/user_upload/i_staatsrecht/Poeschl/Publikationen/Die_Verfassung_und_Ihre_Funktionen_-_onlinedatei.pdf> (accessed 15.7.2021).

[55] *Sudre F.*, Droit européen et international des droits de l’homme, 14e édition, 2019, p. 247.

of the national constitutional courts on the interpretation of state constitutions has to be considered as an interpretation aid for the interpretation of the supranational EU Charter as well.[56] The mutual influence seems to have led to an optimization, not a reduction of the protection of fundamental rights.

In the institutional-formal sphere there are also tendencies towards subjectification, which can also be interpreted as a reflection of the trend towards individualization. It is significant that the idea of individual protection is strengthening, especially in constitutional jurisdiction. The introduction of the individual complaint to a constitutional court is spreading, with few exceptions, in the European area.[57] The structures are similar in approach: access to the constitutional court is only open after going through the regular legal process. This also corresponds to the concept at the international level, insofar as individual access is realized there, as in the model of the Strasbourg Court. This is a departure from the traditional international concept and shows a particularly clear example of individualization, especially in the international sphere, which is characterized by states. As far as the national constitutional complaint is concerned, the detailed structures are then different. On the one hand there is the type of system that follows the German concept and allows a complaint against any act of public authority,[58] and on the other hand there is another type of system, widespread mainly in Eastern Europe, that only allows an individual challenge against laws.[59] Where the individual complaint in the true sense is not permitted, the violation of fundamental rights of executive public power acts is regularly reviewed by the administrative courts or even the ordinary courts.

2. THE TENDENCY OF CONSTITUTIONALIZATION

2.1. The Rule of Law Principle and the Development of Constitutionalism

The *Rule of law* principle is the bridge from the constitutional order of values to the institutions of the state, which have to respect and realize these values. This duty of realization primarily concerns the activities (or omissions) of the institutions, but their structure and functioning must also reflect these values and must also be designed in such a way that they are able to implement them efficiently. Institutional efficiency is a constitutionally intended and implicit part of the structural and functional rules of the

[56] Charter of the Fundamental Rights of the European Union, Article 52.4, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> (accessed 15.7.2021).

[57] For Lithuania, as the most recent case of introducing the individual constitutional complaint, see *Daneliene I.,* Individual Access to Constitutional Justice in Lithuania: The Potential within the Newly Established Model of the Individual Constitutional Complaint, Revista de Derecho Político, 2021, pp. 281-312.

[58] Basic Law for the Federal Republic of Germany (GG), Article 93.1 no. 4a, available at: <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf> (accessed 15.8.2021).

[59] *Haase G., Struger K.,* Verfassungsgerichtsbarkeit in Europa, 2009, pp. 126 et seq., 133, 139/140, 153 etc.

institutions. This constitutionally precludes the weakening of institutional efficiency through ordinary laws.

The principle of the *Rule of law* participates in the further development of constitutionalism, which is essentially based on anthropocentric fundamental values, because of its bridging function, which has been pointed out above. The strengthening of the idea of fundamental rights, i.e. the tendency towards individualization, has also been reflected in the development of the principle of the *Rule of law*. Since the latter is value-oriented, the strengthening of values, especially that of the principle of freedom, has also resulted in a functional advancement of the *Rule of law*.

2.2. The Rule of Law as a Universal Principle

The *Rule of law* is a universal fundamental principle of constitutionalism. It is a principle of state organization that implies the obligation of state institutions to act in accordance with the law. Law, i.e. the legislation and the constitution, are the sole standards for the activities of the state, i.e. of all state organs and other state institutions. The law, and not force or, insofar as law is opposed, political power has to be applied.

2.2.1. The Relationship between Law and Politics

The orientation towards law does not exclude politics. In the course of the development, a change of perspective has taken place - from a pronounced reluctance towards judicial control of political processes especially that of highly political acts, to increased awareness of the primacy of law, above all the supremacy of the constitution, over all state action. The modern concept of the *Rule of law* no longer accepts *a priori* lawless spaces.[60] The law applies exhaustively, there are no longer any 'white spaces' on the 'map of the law'. The only difference is that the distinction between constitutional obligation and political leeway is more sharply focused now.

It is more clearly recognized today that politics is by its very nature shaping, choosing between options, planning for the future, and is thus an essential element of democracy. Politics is expressed by the majority decision in parliament (or in some systems by referendum); politics is transformed into law, into legislation, by the decision of the institutional majority. Politics is thus bound to the law, it takes place within the framework established by the law. The binding of politics to the legislation is relative; it can be changed or abolished by a new majority decision that is different in content. The only requirement that is essential, is that the political decision is made in the institution intended for this purpose, the parliament, and according to the procedure intended for this purpose. Parallels apply in some systems to direct majority decision-making by the

[60] *Drigo C.*, Le corti costituzionali tra politica e giurisdizione, 2016.

people, insofar as it complies with the rules for plebiscitary legislation. Through the institutionalization and organization, the framework for politics is created to acquire the ability to create law by majority vote.

2.2.2. Legality and Constitutionality

Legality, however, and this is the modern aspect of the *Rule of law*, must be legitimized by constitutionality, i.e. by the conformity with the constitution. The constitution expresses the general will of the people, it is an agreement of the society, in the sense of *Jean-Jacques Rousseau* a '*contrat social*'. Only to the extent that the legislation conforms to the constitution, does it express the will of the people, i.e. it is the rule of the will of the people, therefore a democracy. The creation of the constitution is the fundamental legislation, the basic expression of democracy. Both areas, constitution and law, have to be distinguished from each other; they depend on each other, but they are complementary areas. Unconstitutionality of a law therefore means an impermissible transgression of the legislature into the realm of the constitution[61].

2.2.3. The Rule of Law and Anthropocentric Fundamental Values

Since law, and constitutional law in particular, have the protection and promotion of human beings as their primary objective, i.e. they are 'anthropocentric', it is also the objective of the *Rule of law* to make the observance of anthropocentric fundamental values - human dignity, freedom and equality as the core of the constitutional state - binding guidelines for state institutions. The *Rule of law* is thus value-based. This is an essential expression of contemporary constitutional thinking.

The primacy of the constitution thus transposes the anthropocentric value order into the realm of institutions. While the fundamental rights part of the constitution defines the values related to human beings, the *Rule of law* establishes the bridge to the institutional part of the constitution and is therefore essential for the realization of these values.

2.2.4. The Aspects of the Rule of Law

The individual elements of the *Rule of law* can be divided into the following broad groups: the law in formal terms and the law in functional terms. The latter can be subdivided into institutional functioning and substantive functioning.

(1) The *Rule of law* concerning law in *formal* respects is concretized by the formal requirements of the law: it must be clear and definite (*legal clarity*, *legal certainty*); it

[61] *Arnold R.,* Bundesverfassungsgericht e la politica, in: *Scaccia G.* (ed.), Corti dei diritti e processo politico, Edizioni Scientifiche Italiane, 2019, pp. 41-50.

must also be secure (which means *legal certainty*, i.e. the law must guarantee the legal position promised by the norm; *prohibition of retroactivity*, i.e. the position obtained in accordance with the law must not be subsequently devalued; protection of confidence, i.e. the norms generate confidence, on which the addressee must be able to rely).

(2) *Rule of law* in *functional* terms includes the institutional mode of operation: Principle of *legality* (*legality of the administration*, i.e. the formal law must be observed by the administration); *reservation of the law*, i.e. an intervention of the administration into freedom and property requires a legal basis of authorization (this also applies to benefit administration in some systems); principle of *constitutionality* (primacy of the constitution over the law; binding of the legislature to the constitution; binding of the executive and judiciary to the law in conformity with the constitution and to the constitution directly); principle of *separation of powers* (or separation of functions; principle of checks and balances; separation into three powers, i.e. horizontal separation of powers; partial interlocking of functions, i.e. cooperation of powers, partial overlapping of functions, functional core of one power must not be affected); principle of *effective legal protection* (control of executive activity by courts, i.e. independent institutions committed only to the law; in addition, review of court decisions themselves by at least one further instance; *incidental or principal judicial control* of legislation; constitutional jurisdiction as 'perfection of the *Rule of law*').

(3) *Content-related* mode of action: *Value orientation* of the *Rule of law* (transfer of anthropocentric basic values into the realm of institutions, i.e. all state institutions must observe and realize these values - human dignity, principle of freedom, equality - explicitly or implicitly laid down in the constitution; *principle of proportionality* as an instrument for demarcating freedom as a principle and the restriction of freedom as an exception necessary for reasons of equality).[62]

2.2.5. The Rule of Law as an Extra-State Model of Securing Freedom

Securing freedom in relation to the individual is always necessary where public power affects the individual, either interfering with its freedom or essentially determining his or her life situation, even without directly interfering with its freedom. Through the

[62] For these various elements of the *Rule of law*, with reference to the German perspective as embodied in Article 20 of the German Basic Law and specified by a rich case-law of the Federal Constitutional Court, see *Mangoldt H., Klein F., Starck C.* (eds.), Kommentar zum Grundgesetz: GG, Band 2, 7. Auflage, 2018, Commentary on Article 20 GG, specifically: paras. 197-225 (separation of powers); paras. 249-260 (constitutionality, primacy of the constitution, paras. 253-260); paras. 270-284 (legality related to the executive), paras. 285-286 (legality related to the judiciary); paras. 289-291 (legal certainty); paras. 292-297 (protection of confidence in law); paras. 308-320 (proportionality); para. 311 (impact of the case-law of the Strasbourg and Luxembourg courts). The case-law of the Federal Constitutional Court clearly shows that the elements of the *Rule of law* are derived from the essence of the law. This also explains why parallel aspects have developed in other legal systems.

transfer of public power from the state to organizational units outside the state, this situation also arises, and with particular clarity, in the supranational community of the EU and, in a weakened form, also in the international community. Since the anthropological reference point of law is always the same, the human-related fundamental values must also be observed and realized there. As a transfer mechanism, the *Rule of law* (outside the state called community of law, union of law or with a neutral term – the *Rule of law*) is indispensable. This has already led to the formation of this idea outside the state. One only has to look at Article 2 of the Treaty on European Union, at the Statute of the Council of Europe, under whose aegis the ECHR came into being, and at the Charter of the United Nations, to see the importance that the international community attaches to law and the need to respect it. One can therefore certainly speak of the transnational and even universal validity of the *Rule of law*.

2.2.6. Constitutional Justice as 'Perfection of the Rule of Law'

The *Rule of law* means efficient observance of the law by the public power. It is only efficient if it is also subject to judicial control. This is important for compliance with ordinary laws by the administration and the judiciary, but also for compliance with the supreme source of law in the state, the constitution, which is required by the *Rule of law*. The judicial protection of the constitution is constitutional justice, which can be carried out in two basic forms: by the ordinary courts or special courts, such as administrative courts, or by separate constitutional courts, according to the model of *Hans Kelsen*, under whose influence the first constitutional court was created in Austria in 1920, which could declare laws unconstitutional and null and void.[63] Both models have also asserted themselves in contemporary constitutionalism, although, at least in Europe, constitutional justice as a special jurisdiction has predominantly found favor. A European model of special constitutional justice has developed from the Austrian model,[64] while the American model, the constitutional review by the ordinary courts in a specific legal dispute, has become particularly widespread in the Common law countries.[65] The constitutional review, independent of a concrete legal dispute in another matter, which can lead to an *erga omnes* declaration of invalidity of a law, is specific to independent constitutional justice. The guardianship role in favor of the constitution emerges here with clarity.

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[63] *Schambeck H.,* Hans Kelsen und die Verfassungsgerichtsbarkeit, in: *Arnold R., Roth H.* (eds.), Constitutional Courts and Ordinary Courts: Cooperation or Conflict?, 2017, pp. 10-21.

[64] Also in 1920, the Constitutional Court of Czechoslovakia was established under the influence of the ideas of *Hans Kelsen* and *Adolf Julius Merkl*, but it saw little action. *Osterkamp J.,* Verfassungsgerichtsbarkeit in der Tschechoslowakei, 2009.

[65] *Haase G., Struger K.,* Verfassungsgerichtsbarkeit in Europa, 2009, pp. 22-24; *Dickson B.* (ed.), Judicial Activism in Common Law Supreme Courts, 2007.

However, it must also be emphasized that every court that applies the laws must also review their constitutionality, thus, due to the hierarchy of norms in a state, every court also has a constitutional function. Only those laws that are in accordance with the constitution, may be applied by the court. The primacy of the constitution entails the duty of the court to carry out this review. What the court's reaction is, if it finds that the applicable norms are incompatible with the constitution, varies. In some systems it is the courts themselves that in such cases do not apply this law (compare for example Greece[66], Portugal[67]), in other systems a referral must be made to a central court, in particular a constitutional court, which then decides on the nullity of the law. Only in such a case the law can be annulled; in the case of decentralized review and decision-making competence shifted to the individual courts, the typical reaction is non-application, but not a formal annulment of the law. In systems, where special constitutional courts are lacking, the ordinary courts have often assumed their competence to carry out the review of the law and, in the case of unconstitutionality, to allow a law to be set aside. This is also historically the beginning of constitutional justice in a decentralized sense, a development that began even before the creation of special constitutional courts. The US Supreme Court practiced this as early as 1803 in the famous *Marbury v. Madison* decision[68], much later also the German *Reichsgericht* in 1925,[69] but also courts in Portugal, Norway, Denmark and other states.[70] Another way of giving effect to the constitution, is to oblige courts to interpret laws in conformity with the constitution in order to ensure their applicability by harmonizing them with the highest-ranking source of law in the state.[71] These are also manifestations that have developed in numerous countries.

2.2.7. Constitutional Justice and Politics

Politics is also bound by the constitution. Constitutional justice can review the constitutionality of policies. In no way does this turn constitutional courts into political actors. Constitutional courts react, they do not act as politics does. Since the constitution

[66] Constitution of Greece, Article 93.4, available at: <https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf> (accessed 15.8.2021).

[67] Constitution of Portugal, Article 204, see also Article 280, which provides the possibility to appeal to the Constitutional Court, if a court does not apply a law because it considers the law unconstitutional, available at: <https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf> (accessed 15.8.2021).

[68] *Marbury v. Madison*, 5 U.S. 137 (1803), available at: <https://supreme.justia.com/cases/federal/us/5/137/> (accessed 15.7.2021).

[69] Judgment of the German *Reichsgericht* (the supreme court of the German Reich) - RGZ 111, 320, original text available at: <https://www.saarheim.de/Entscheidungen/RGundStGH/RGZ%20111,%20320.pdf> (accessed 15.7.2021).

[70] *Haase G., Struger K.,* Verfassungsgerichtsbarkeit in Europa, 2009, pp. 229 et seq.

[71] See for the German legal situation *Schlaich K., Korioth S.,* Das Bundesverfassungsgericht, 11. Auflage, 2018, paras. 440-451.

establishes rules about values and institutions, it necessarily determines the limits of the political process. The *Rule of law* requires the constitutional control of political actors. This means, on the one hand, that there are no control-free political questions areas.[72] Such a limitation of judicial control, as exists in some systems, is not compatible with the primacy of the constitution and therefore does not correspond to the modern understanding - and the only correct understanding - of effective *Rule of law*.

However, constitutional justice may not interfere with the political process as such; it can only examine whether the framework drawn by the constitution has been observed or exceeded by politics. This applies to the entire field of politics and also especially to the transformation of politics into law via majority decision-making in parliament (or in the process of plebiscitary legislation) already mentioned above.

Constitution and legislation (the latter as a result of majority political decision-making) are, as it has already been pointed out, two different spaces to be separated from each other. If politics, i.e. legislation, crosses the border to the constitutional space, it acts unconstitutionally. Constitutional justice determines such transgressions and restores the intended hierarchical order of norms by declaring the law invalid or unconstitutional.[73] The constitutional court corrects the policy's violation of the constitution, it does not prevent the policy's content. Politics is coping with actual problems through planning and goal-adequate action, choice between different options of orientation and expediency, planning for the future, and so on. Constitutional determination is an abstract agreement by society on values and rules of action that claim general binding force.

The difference is clear; the functional spheres are clearly separated. Political action is formative, but limited by constitutional bindings. Certainly, it is difficult for the courts to always clearly separate the specific constitutional reference from the political action in complex factual situations. Therefore, a frequent pragmatic tool is to limit the intensity of control, the so-called control density, to obvious unconstitutionality. The German Federal Constitutional Court gives examples of this, but also indicates that the standard of review is in turn stricter in the case of facts that belong to the person as such. A certain gradation according to spheres, related to the intimate, private or social sphere,[74] comes into play, which makes the special relationship of constitutional justice to individuals clear.[75] A similar flexible concept is the doctrine of justifiability.[76]

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[72] *Arnold R.,* Bundesverfassungsgericht e la politica, in: *Scaccia G.* (ed.), Corti dei diritti e processo politico, Edizioni Scientifiche Italiane, 2019, pp. 41-50, 47; *Drigo C.*, Le corti costituzionali tra politica e giurisdizione, 2016.

[73] *Arnold R.,* Justice constitutionnelle: contre-pouvoir politique ou juridique? in: *Ben Achour, R.* (dir.), Constitution et contre-pouvoirs, Colloque 19 et 20 février, 2015, pp. 53 et seq.

[74] As to the theory of spheres see *Kingreen T., Poscher R.,* Grundrechte. Staatsrecht II, 32. Auflage, 2016, para. 413, pp. 100-101; *Hufen F.,* Staatsrecht II. Grundrechte, 3. Auflage, 2011, p. 126.

[75] *Schlaich K., Korioth S.,* Das Bundesverfassungsgericht, 11. Auflage, 2018, paras. 532 et seq.

[76] *Schlaich K., Korioth S.,* Das Bundesverfassungsgericht, 11. Auflage, 2018, paras. 532-533.

2.2.8. Constitutional Justice and the Separation of Powers

If constitutional justice respects the difference between the constitutional and legislative branches, the principle of separation of powers, which is fundamental to the *Rule of law*, is not violated. The legislature's scope of discretion must be adequately respected; what has just been said for political decision-making, applies here too. The legislature's scope for design, and especially its scope for prognosis, are wide. As long as the design does not constitute a specific violation of the constitution, it cannot be objected to by the courts. Insofar as the legislature's prognosis[77] is based on sound research, there is no unconstitutionality, even if the prognosis does not materialize. Here, however, a claim arises from the constitution, which the legislature must fulfil without delay.[78] In order to spare the genuine function of the legislature, the figure of the so-called 'appeal decision' has developed in the practice of the German Federal Constitutional Court, to cite this example here, according to which, the law is not declared null and void and invalid, but only unconstitutional, and this is combined with the obligatory appeal to the legislature, often specified by a concrete deadline, to establish the constitutionally compliant state by amending the law.[79]

In connection with the principle of separation of powers, it should also be mentioned that politicians often refer to the constitutional courts as *'gouvernements des juges'* or similar and call for 'political self-restraint'.[80] Consciousness of the *Rule of law* is thereby repeatedly and wrongly denounced as constitutional court actionism. It seems that in the Federal Republic of Germany rather the opposite tendency is becoming visible: if politics fails to find a solution to a controversial problem, there is a call for 'going to Karlsruhe'. Since almost all political problems also have constitutional components, the judicial solution, which after all relates to legal issues, is also envisaged as a political solution path. Moreover, there are a number of other points of contact between constitutional jurisdiction and the separation of powers: the dynamic interpretation of the constitution, which - rightly - is seen as a 'living instrument',[81] the - due to the function and authority of the Constitutional Court necessary - special binding effect vis-à-vis the public powers, etc.[82]

[77] *Schlaich K., Korioth S.,* Das Bundesverfassungsgericht, 11. Auflage, 2018, paras. 532 et seq.
[78] *Schlaich K., Korioth S.,* Das Bundesverfassungsgericht, 11. Auflage, 2018, paras. 435-436.
[79] *Hillgruber C., Goos C.,* Verfassungsprozessrecht, 4. Auflage, 2015, paras. 538 et seq., 544a.
[80] *Hillgruber C., Goos C.,* Verfassungsprozessrecht, 4. Auflage, 2015, paras. 40, 42.
[81] See Juge constitutionnel et interprétation des normes, XXXIIIe Table ronde internationale des 8 et 9 septembre 2017, Aix-en-Provence, in: 'Annuaire international de justice constitutionnelle', 2017, pp. 79-526.
[82] *Schlaich K., Korioth S.,* Das Bundesverfassungsgericht, 11. Auflage, 2018, paras. 474, 501.

3. THE TENDENCY TOWARDS INTERNATIONALIZATION

An important tendency in contemporary constitutionalism is towards internationalization. The state of today is not a closed, but rather an open state.[83] The vehement advancement of globalization makes it impossible for the state to solve its most important tasks alone, only nationally. The economy, security, science and technological progress are only promising in an international context. Tasks of the state that used to be performed nationally are now internationalized, i.e. in a division of labor with cooperation partners in other countries or also through participation in international bodies and organizations. Even if the main focus of the tasks remains in the state, there are still numerous influences from international law, often also from soft law. A special form of internationalization is *supranationalization,* which only takes place in this form in the area of the European Union. Here, large parts of national decision-making powers are functionally detached from the state and institutionally Europeanized. Functionally, this happens with state-like instruments and mechanisms.[84]

While national constitutional law formally retains its superior role to state law in conventional areas of international law, nevertheless adapting to extra-state law to a considerable extent through interpretation in conformity with international law, the creation of the supranational legal order has opened up state sovereignty to a much greater extent. This opened legal order is flooded with supranational norms, so that, as already mentioned, the national legal order is a hybrid set of norms, integrated from national and supranational norms. For the member states of the EU, the opening of their statehood is manifest. Constitutional law is also internationalized, above all because EU law claims precedence over national constitutional law. This is accepted in principle by most, but not all, member states (for example, not by Poland[85]), but reservations are raised against undermining the constitutional core, often called constitutional identity. In German constitutional law, the reservation of the constitutional identity defined in the Lisbon Decision is relevant, indispensable part of which is seen in the so-called 'eternity clause' *(Ewigkeitsklausel)* of Article 79 (3) of the Basic Law, to which the integration norm of Article 23 (1) of the Basic Law refers.[86] However, this is also relativized by the case-law of the Constitutional Court, as the concretizations of the

[83] *Geiger R.,* Grundgesetz und Völkerrecht, 6. Auflage, 2013, p. 1 et seq.

[84] For the explanation of the transfer of national sovereign rights, i.e. of national competences to the supranational bodies, as the opening of the formerly closed legal order of the state, see the Order of the German Federal Constitutional Court of 29 May 1974 - BVerfGE 37, 271 (280) - BvL 52/71, available at: <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588> (accessed 15.7.2021).

[85] Judgment of the Constitutional Tribunal of Poland of 11 May 2005 - *Poland's Membership in the European Union (the Accession Treaty)* (K18/04), available at: <https://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf> (accessed 15.7.2021).

[86] Judgment of the German Federal Constitutional Court of 30 June 2009 - BVerfGE 123, 267 - 2 BvE 2/08, English version available at: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html> (accessed 15.7.2021).

values in the EU Charter of Fundamental Rights, even beyond Article 79 (3) of the Basic Law, are seen as part of a common set of values of the member states, the EU and the ECHR.[87] The idea of a functional substitution of one legal order by the other is seen as decisive here, provided only that the goal, the efficient protection of human beings, is adequately achieved. The complexity of the relationship between national fundamental rights catalogues and the EU Charter of Fundamental Rights, which is seen in important nuances in the case-law of the Court of Justice of the EU on the one hand and, to cite the example of Germany, the Federal Constitutional Court on the other, is resolved by referring to the common anchoring in European guarantee instruments in favor of a European convergence of values.[88]

As far as the relationship of international treaties to the national legal order is concerned, there are two systems, the dualistic and the monistic system. The former system is based on the idea that the international legal order and the national legal order are two separate spheres that cannot be mutually normatively penetrated; this is the traditional conception, also prevalent in Germany, which results in international treaties (including those guaranteeing human rights) being transformed into German law in accordance with Article 59 (2) of the Basic Law. The other, more modern conception, which is realized in the vast majority of states, assumes a possible unity of both legal systems, so that international treaties are integrated into the domestic legal system as a source of international law. The practical consequence of this more modern conception, which is also predominantly followed in state practice (compare the further development in Italy[89]), is that the courts apply international law and not national law in the event of a conflict. The general rules of international law are also integrated into the national order in dualistic systems and are not transformed (not even generally).

The concept of open statehood shows a more 'familiar' relationship to international law and demonstrates how the general developments in the legal thinking of the international community also make it binding for internal law. The fact that this process continues through the dissolution of the strict schemes, formally prescribed by the constitution, can be seen especially in the area of the interpretation of internal law, including constitutional law, which is friendly to international law. This tendency has also prevailed in traditional systems such as Germany's. It has already been mentioned that the human rights guarantees under international law also apply as internal guidelines for national law and its interpretation, which the constitution expresses in a prominent place, in Article 1 (2) of the Basic Law, from the very beginning and which was later

[87] Order of the German Federal Constitutional Court of 1 December 2020 - 2 BvR 1845/18, para 68, English version available at: <http://www.bverfg.de/e/rs20201201_2bvr184518en.html> (accessed 15.7.2021).
[88] Order of the German Federal Constitutional Court of 6 November 2019 - 1 BvR 16/13 - BVerfGE 152, 152-215, paras. 56 et seq., English text available at: <http://www.bverfg.de/e/rs20191106_1bvr001613en.html> (accessed 15.7.2021).
[89] *De Vergottini G.*, Diritto costituzionale, 9th edition, 2017, p. 50.

translated into concrete practice; for the area of the ECHR, this is particularly visible in the case-law of the Federal Constitutional Court since 2004.[90] The explicit statement in constitutional case-law that internal law, including constitutional law, is to be interpreted in a way that is friendly to international law (and European law) is another milestone on the way towards the internationalization of internal law. The pragmatic guarantee of the primacy of international law through interpretation has also taken its course in other legal systems and appears to be an adequate instrument for harmonizing both areas of law. This harmonization through interpretation is, as already mentioned, also strikingly visible in the interaction of the ECHR, the EU Charter of Fundamental Rights and the national protection of fundamental rights in the constitution. The filling of general legal terms, used in the constitutional text, with the help of international law, has also already become practice, for example with regard to the environmental protection obligations under Article 20a of the Basic Law, as in the most recent decision by the German Federal Constitutional Court.[91]

To take another example from German constitutional law, it is a further step towards internationalization when the Federal Constitutional Court not only reviews the correct application of German constitutional law by the German courts, but it recently also examines the correct application of the EU Charter of Fundamental Rights by them. This is done by pointing out that the Federal Constitutional Court is the 'guardian of the efficient protection of fundamental rights' of the individual, irrespective of whether this protection is granted by German or EU law. In this decision, the idea of the substantive and functional convergence of national, international and supranational protection also comes into play.[92]

IV. THE MODERNITY OF THE CONSTITUTION OF THE REPUBLIC OF GEORGIA OF 1921 – THE ANTHROPOCENTRIC FUNDAMENTAL VALUES ORDER

On the basis of an analysis and reflection on the basic structure of modern constitutionalism, the Constitution of Georgia of 1921, which celebrates its 100th anniversary this year, will be examined in terms of its constitutional 'modernity'. The detailed analysis of this constitution has already been carried out in an excellent

[90] Order of the German Federal Constitutional Court of 14 October 2004 - *Görgülü* case, English version available at: <http://www.bverfg.de/e/rs20041014_2bvr148104en.html> (accessed 15.7.2021).
[91] Order of German Federal Constitutional Court of 24 March 2021 - 1 BvR 2656/18, para. 203, English text available at: <http://www.bverfg.de/e/rs20210324_1bvr265618en.html> (accessed 15.7.2021).
[92] Order of the German Federal Constitutional Court of 6 November 2019 - 1 BvR 276/17- BVerfGE 152, 216-274, English version available at: <http://www.bverfg.de/e/rs20191106_1bvr027617en.html> (accessed 15.7.2021).

manner[93] and will not be repeated here. In terms of time, the Georgian constitution ranks with the 1919 Constitution of Germany, the Weimar Constitution, which came into being in Europe after the First World War, and the Austrian Constitution of 1920.

As it was explained in the previous study, the foundation of any true constitution is its anthropocentric purpose. The law, and thus the constitution in particular, places the human being at the center and has as its ultimate and highest objective to protect and promote the human being. The ideal starting point is the human dignity as an anthropological axiom. Three basic elements, which are intrinsically linked to each other, make up this system of fundamental values: the *dignity* of the human being, his fundamental *freedom* (to which democracy, i.e. political freedom, belongs, as an essential element) and *equality* as a postulate linked to being human as such. Added to this is the principle of the *Rule of law,* which transfers these values into the institutions.

These fundamental values are anchored in a constitution insofar as it is oriented towards the sovereignty of the people and the respect for fundamental and human rights. These values are necessarily co-existent, they exist normatively in their entirety in a constitutional order, regardless of whether they are written or implicit in the overall structure of the constitution.

The commitment of the Georgian Constitution of 1921 in the introductory norm to a 'democratic republic' (Article 1) expresses a basic principle that may not be changed even by constitutional amendment (Article 148). Democracy is the political self-determination of the people, but at the same time also it is the self-determination of each part of the people, the individual. This self-determination, however, is not a numerical matter alone, but precisely a value-based, substantive decision. Democracy, as self-determination by majority, would run empty if decisions could be made in a way that would be directed against the dignity and freedom of the human being. Democracy can only legitimize decisions, if they correspond to the basic values of human beings and realize them.

A purely 'formal' democracy is not a real, 'substantial' democracy. Detached from these values, it would be a democracy against man and thus a contradiction: self-determination of man can only be for, not against man. Democracy and human rights are therefore necessarily linked. Democracy is, as another aspect of constitutional connectivity, necessarily a constitutional democracy. The product of democratic decision-making in the institution of parliament (or also via a referendum) only fulfils its function of expressing the will of the people, if it respects the constitution. As already stated above, only the law that conforms to the constitution, expresses the will of the people. This is clearly recognized by the Georgian Constitution of 1921.

[93] *Papuashvili G.,* The 1921 Constitution of the Democratic Republic of Georgia: Looking Back after Ninety Years, European Public Law, 2012, pp. 323-349.

Article 52 declared that the sovereignty resides in the nation, i.e. in the people and the Parliament exercises this sovereignty, but only within the limits of the constitution. The parliament is bound not only by the formal requirements for legislation, but also by the substantive limits set by the constitution. This is a clear shift towards the 'constitutional state'. Also corresponding to this, is the fact that Article 8 postulates the primacy of the constitution. This also expresses the important aspect that legislation may only interfere with constitutional rights, i.e. fundamental rights, insofar as this is constitutionally compatible, since otherwise the constitutional postulate of freedom would be disregarded. On closer examination, this also gives rise to the need to observe the principle of proportionality, which is part of modern constitutionalism, since it presupposes freedom - which democracy demands - but also the community demands restrictions in favor of the other members of the community, in other words restrictions in favor of the general interest.

Democracy therefore means the recognition of the freedom of the individual, so that the basic rights and the self-determination of the individual are recognized for the sake of the free, but community-bound human being. This means that freedom is recognized as a principle, which, however, is subject to restrictions due to the fact that freedom is bound to the community, ultimately due to the principle of equality, but which may not exceed the level intended by the constitution. Democracy, however, can only be genuine if it is based on a democratic right to vote. Article 46 establishes the principles of electoral law (universal, equal and direct elections, secret ballot, proportional representation). Particularly modern at that time is the equal voting right for men and women in the Georgian Constitution of 1921, which was only introduced in Germany, for example, in 1918.

The fundamental rights are specifications of freedom and ultimately an outflow of human dignity. In accordance with the principle of freedom, fundamental rights are comprehensive. There can be no gap, since the constitutional goal is always directed towards the effective protection of the human being. This is the normative-ideal basis of the constitution, even if the written fundamental rights do not cover all threats to freedom. These are nevertheless implicitly present. Article 45 of the Georgian Constitution of 1921 clearly expresses this. This is a very insightful provision with proper content. It clearly confirms the comprehensive aim of protection. This also applies to the interpretation of seeking the effective protection of the individual and, in accordance with the principles of the Constitution, also deriving new, i.e. not yet formulated, rights.

The basis of the anthropocentric constitutional order, human dignity as the supreme constitutional value, is not explicitly mentioned, as in many current constitutions. Nevertheless, the obligation to protect and promote human dignity is implicit in the constitutional order; as already emphasized, the fundamental rights explicitly enshrined

in the constitution, as an expression of the basic principle of the freedom of the human being, necessarily presuppose the normative, albeit implicit, existence of the guarantee of its dignity. Moreover, Article 113 enshrines a goal of the state to strive for a 'dignified existence' for all citizens. This introductory provision of Chapter XIII of the 1921 Constitution on *Social and Economic Rights* is a target provision that is similar to a program standard and concerns the part of human dignity that comprises the material minimum of human existence. In addition, however, human dignity in its entire spectrum is present in unwritten form as a normative guarantee.

The Georgian Constitution of 1921 contains the classic catalogue of fundamental rights, with some emphasis on *habeas corpus*, which was considered to be in particular need of protection at the time, personal inviolability being the starting point (Article 22; detailed provisions continue on the area of *habeas corpus*, Articles 23-27). Emphasis is also placed on the protection of privacy in so far as these are traditional fundamental rights, the guarantee of the inviolability of the home (Article 28) and the protection (subject to judicial review) of private correspondence (Article 29). In addition, there is the right to freedom of movement (Article 30). Freedom of religion and conscience are protected (Article 31), as is freedom of expression, including the prohibition of censorship. The only limit is the commission of a criminal offence, which must be determined by a judge (Article 32). Freedom of assembly and association are also explicitly protected (Articles 33-35). Freedom of occupation and enterprise (Article 36 with a rather broad formulation) and the right to strike for workers (Article 38) are also recognized in the Georgian Constitution of 1921.

Equality is particularly respected by the 1921 Constitution, for example in the fundamental norm of Article 16 and in the specific norms of Articles 17 and 18, which prohibit distinctions of class and on the basis of titles (with the exception of university degrees) and exclude the awarding of decorations (but retain war awards). In addition, there are Articles 39 and 40, which emphasize the equality of rights with regard to political, civil, economic and family rights. In addition, equality within marriage between man and woman and also that of the children born within or outside marriage is established, a constitutional guarantee far ahead of its times. The right to vote, extended indiscriminately to men and women, is also guaranteed in Article 46, as already mentioned above. The right to asylum is anchored in Article 41 for political persecution. It should also be mentioned that the death penalty was abolished already at that time (Article 19).

The chapter on *Social and economic rights* sets out a series of social rights and programs. It is noteworthy that Article 113, which heads this chapter, expresses the basic idea of a state's duty to provide a 'dignified existence'. Derived from this are the partly classical fundamental rights, such as the right to property and its limitations (on social commitment and expropriation, Article 114), partly programmatic objectives:

protection of labor (Article 117), unemployment benefits (Article 119), incapacity to work (Article 120), limitation of working hours (Article 123), minimum wage (Article 125) and others. The establishment of the maternity protection and the protection of motherhood and children in the 1921 Constitution (cf. Article 126) should be also emphasized. It should be noted at this point that those fundamental social rights are generally implemented by politics, i.e. the legislature. But the constitutional norms, which are only programs, are normative guidelines for politics, which, however, leave the legislature a wide scope for action. It should also be mentioned that the constitution contains important rights for the protection of ethnic minorities (Article 129 and 130 as basic norms with further specifications in particular concerning non-discrimination and legal protection).

The other pillar of constitutionalism, the *Rule of law*, is also anchored in the Constitution of 1921, even if this concept is not explicitly mentioned there, in keeping with the times. However, the *Rule of law* is present even in the modern sense, since not only the binding of the executive and the judiciary to the laws, i.e. legality, but also the binding of the legislature to the constitution, i.e. constitutionality, is explicitly laid down; Article 8 (also Article 9 concerning pre-constitutional law) and Article 52 are the key norms for this. Article 10, which establishes the unlimited validity of the constitution in principle, also underlines the position of the constitution as a fundamental order. This is also reinforced by Article 76 (a), according to which the Senate, Georgia's highest court, supervises the strict enforcement of the law. According to the constitution, the *Rule of law* is to be implemented efficiently.

At the same time, the constitutional order is value-oriented, as has just been explained in detail in the analysis of the fundamental rights. If the *Rule of law* requires a commitment to the constitution, it also requires a commitment to fundamental rights, i.e. to values. The idea of the *Rule of law* underlying the 1921 Constitution is therefore value-oriented. Effective legal protection, which is only given if the independence of the courts is guaranteed, is of particular importance within the *Rule of law* principle. This is enshrined in Article 78 (orientation of jurisdiction to the law), Article 79 (functional independence of the courts) and Article 83 (personal independence of judges). As far as the numerous individual characteristics of the *Rule of law* derived from the concept of law (clarity, definiteness of the law, legal certainty and legal stability, principle of legality) and resulting from the function of law (protection of legitimate expectations, prohibition of retroactivity, proportionality, etc.) are concerned, these are concretizations developed by the case-law.

In conclusion, it can be said that the text and the overall structure of the Constitution of Georgia of 1921 meets the requirements of a modern liberal-democratic, i.e. an anthropocentric constitution. It even contains elements that were particularly progressive compared to the other constitutions of that time, the German Weimar Constitution of

1919 and the Austrian Constitution of 1920 (which, however, implemented the concept of a specific constitutional jurisdiction as its own special feature).

Modern constitutionalism, however, also means that the implementation of the constitutional text by the legislature, the judiciary and the politicians confirm and advances the modern image of the constitutional text. A constitutional culture based on the ideals of human dignity, freedom and equality must develop further. This is only possible if there is a consolidated democracy whose significance for human freedom is rooted in the commitment of society and the political forces, and which is also practiced according to this commitment.

Irakli Kldiashvili[*]

UNDERSTANDING OF AMERICAN CONSTITUTIONALISM AND FUNDAMENTAL RIGHTS, A HISTORICAL RETROSPECT AND THE VALUES ESTABLISHED BY THE 1921 CONSTITUTION OF GEORGIA

ABSTRACT

On the eve of the 20th century the Constitution of Georgia became one of the most progressive legal documents in the region. It did not only establish the tripartite separation of political power among the governmental branches, but it also fully expressed the fundamental values and rights shared by the then contemporary western community.

The concept of a written constitution, along with the fundamental rights rooted in the natural law philosophy, triggered the rise of an entirely new perspective for the in-depth definition of constitutionalism. Unsurprisingly, the Georgian Constitution of 1921 reflected these values in its text and became the basis for its modern successor.

In this light, it is worth remembering the roots of the American fundamental values that made their way into the first written constitution in the world – the Constitution of the United States of America.

I. DECLARATION OF INDEPENDENCE OF GEORGIA

'The present condition of the Georgian people necessarily requires Georgia to create its own independent political organization in order to resist the oppression by its enemies and to lay a solid foundation for its independent development. Accordingly, the National Council of Georgia, elected by the National Assembly of Georgia on the 22nd of November 1917, declares that:

From now on, the Georgian people shall hold sovereign rights and Georgia shall be a sovereign, independent State.'[1]

This excerpt from the declaration of independence, proclaimed on May 26, 1918 by the National Council of Georgia, declared the independence of Georgia, thus establishing a

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[1] Act of Independence of Georgia declared on May 26, 1918, available at: <https://matsne.gov.ge/ka/document/view/4801451?publication=0> (15.6.2021).

new mode of statehood and the political structure for the country, that had experienced numerous centuries of political existence.

Shortly afterwards, in 1921, the National Council of Georgia adopted the fundamental document for the country, the Constitution of Republic of Georgia. The 1921 Constitution can indeed be perceived as one of the most advanced political documents in its contemporary world, acknowledging the fundamental human rights and guaranteeing the establishment of a political system that would ensure the protection of the most valuable rights.

Several scholars have rightly commented that the 1921 Constitution of Georgia shared and embraced the best practices of its contemporary examples, particularly mentioning the US Constitution.

Similarly, to the 1921 Constitution of Republic of Georgia, the US Constitution was also adopted shortly after the declaration of independence of USA. Both declarations put great emphasis on the fundamental human rights that were ultimately incorporated in the respective Constitutions of USA and Georgia.

'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness."[2]

At the beginning USA had, similarly to the Republic of Georgia, not one, but two great founding documents: the Declaration of Independence and the Constitution. The first one declared the countries' freedom and independence and the second one established their constitutional orders.

Both declarations served a number of purposes, but some of them are particularly important, such as the justification of resistance to despotic authorities and the idea of fundamental rights and equality. The concept of equal and unalienable rights and the notion of popular consent and limited government are generally affiliated with the declarations that emphasized that 'as first principles dictated by nature and discernible by all possessed reason, they needed no demonstrative proof; they constituted obvious points of departure, axioms from which to proceed or moral imperatives deriving from the essential nature of man, upon which to act'.[3]

[2] United States Declaration of Independence, July 4, 1776, available at: <https://www.loc.gov/exhibits/jefferson/jeffdec.html> (accessed 1.7.2021).

[3] *Wood G.,* The Creation of the American Republic 1776-1787, 1969, p. 163.

II. 'SELF-EVIDENT' TRUTHS…

As, *Thomas Jefferson* wrote about the US declaration, 'its objective was to place before mankind the common sense of the subject, in terms so plain and firm as to command assent, and to justify ourselves in the independent stand we were compelled to take'.[4] The American independence was defended on the grounds of undeniable 'self-evident' truths applicable to all men. As applicable to all people, the New England settlers embraced plain philosophical principles and made them comprehensible to every single member of their communities.

In both countries, in USA as well as in Georgia, shared values were manifested into recognized idioms that enabled people to unite and fight for their independence. Yet, united by the shared values, the people had to establish a strong state with the durable political structure deeply linked with its constituents.

III. SOCIAL CONTRACT…

The first settlers, who sailed to America, had an honest desire to set the 'City upon a hill', the model city approved 'by a mutual consent'[5] of morally alike townsfolk. Georgians too, wished to establish a model state in the South Caucasus, well perceived, respected by the Western community and admired by its neighboring countries too.

Both nations believed, that legitimate political power originates and remains subject of the consent of the governed. The US declaration's justification for separation was the echo of a widely accepted social contract theory, similar to that employed by *John Locke* in his Second Treatise. 'The basic theory of the social contract was that power initially belonged to the people by innate, natural right.'[6]

Furthermore, individuals living without government in the state of nature enjoyed equal liberty and natural rights. And, too, 'they could dispose of this power, as they liked. To form a state, they would contract among themselves to join together in union. Then they would delegate certain powers but reserve all other authority to the people'.[7] As one of the greatest Americans, *Abraham Lincoln* said in his first major speech, while debating with *Steven Douglas* in a Senate campaign in Illinois, 'no man is good enough to govern another man without their consent, this is leading principle of American republicanism'.[8]

[4] *Jefferson T.* [*Peterson M. D.* ed.], Writings, 1984, p. 1501.
[5] A model of Christian Charity, Winthrop Papers, 1931, pp. 293, 295.
[6] *Collier C.,* Decision in Philadelphia, The Constitutional Convention of 1787, 2007, p. 137.
[7] *Collier C., Lincoln J. C.,* Decision in Philadelphia, The Constitutional Convention of 1787, 1987, p. 63.
[8] *Linconl A.,* The Collected Works of Abraham Lincoln, Volume II, 2008, p. 266.

The concept of popular sovereignty was widely embraced by the founding fathers of the Republic of Georgia in 1921 (hereinafter referred as Georgian Founding Fathers). Influential works of political philosophers and practical examples of their contemporary world inspired the idea of the parliamentary republic. Influenced by the social contract theory, Georgian politicians of that time, attempted to retain control of the people over the political process as much as it was possible.

The understandings of social compact theory varied and its relevance had changed substantially over the several years by the beginning of the 20th century. Political philosophers of that period drew a line between the social contract (which is closer to a compact about general principles) as an agreement among citizens on the fundamental issues related to the state building on one hand, and an agreement (which is closer to a fully drafted contract) between government and citizens on the other. A compact (social contract) could not be considered a bargain among people. It was more contemplation of cultural values, attitudes to justice and common destine, therefore lacked elements that usually characterized ordinary contract. And it also defined political power, methods of delegation of power, and the proportions of the distribution of power and sought the achievement of higher goals, such as uniting people into one whole, body of politics.

On the other hand, a contract between rulers and ruled, between representatives and constituents, could be viewed through the traditional contract aspects, that include mutual bargain and put emphasis on the protection and allegiance. Nevertheless, there is no second contract between the rulers and the ruled. The Lockean idea of trust would suffice to show peculiarity of fiduciary relationships between the people (original source of the power) and the rulers (agent of the people). People (as a principle) trust rulers (as an agent) to manage their affairs and strictly follow the terms of the implied agency. The community entrusts the government with certain functions when entering the civil society. And if the government does not follow the policy according to people's interests, then the community can withdraw its obedience to the government. The right of unilateral withdrawal from this agency differs from the relationship that the parties have in a bilateral contract. In an ordinary contract case, the breaching party does not easily give up, therefore a conflict arises, which leads to a long legal dispute between the parties.

John Locke stated very clearly that in case of a conflict only particular causes could trigger a right to change the government and 'prudence, indeed', [would] 'dictate that Governments long established should not be changed for light and transient causes'.[9] In political affairs, in contrary to the general agreements, categories of violations are far different to trigger moral right of revocation of the trusted power. The moral right of

[9] United States Declaration of Independence, July 4, 1776, available at: <https://www.loc.gov/exhibits/jefferson/jeffdec.html> (accessed 1.7.2021).

resistance is justified 'whenever any form of government becomes destructive' of the proper end of securing rights, then 'it is the right of the people to alter or abolish it, and institute new government'.[10]

IV. 'STATE OF PERFECT FREEDOM…'

The US declaration endorses the creation of a government form that is based on equality. This equality arises out of Lockean state of nature, where each individual is in a 'state of perfect freedom'.[11] The US Founding fathers stressed the moral equality of all men in the possession of a common human nature and an ability to discern the principal dictates of universal moral law. As *Thomas Jefferson* explained it, there is a common capacity in men to discern 'the principles of right and wrong'.[12]

Based on these, the US declaration opens venue for equal possession of rights, elimination of artificial distinction between individuals, equal treatment under law, equal right to the fruits of one's labor, and equal right to participate in the determination of the form of government and in the formulation of its laws.

Equality, derived from the fundamental desire of each individual for self-preservation, is reflected in the formation of the American political society, where each member of the society agrees 'to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed.'[13]

V. 'UNALIENABLE RIGHTS…'

Possessed by individuals in the state of nature, natural rights or unalienable rights cannot legitimately be renounced or suppressed in the formation and governance of political society. The founding fathers of both countries, Georgia and USA, did everything to secure power for the people. Original postulates of natural law were condensed and safely handed to their genuine patron – the civil society.

Molded by tradition, customs and unwritten rules, natural law attained its commonsensical mode of operation. Unalienable natural rights, as 'the substance of the law of nature as applied to man,'[14] proclaimed by *John Locke* and later modified by *Thomas Jefferson* in the Declaration of Independence – 'Life, Liberty and Pursuit of happiness', became the

[10] *Wood G.*, The Creation of the American Republic 1776-1787, 1969, p. 270.
[11] *Locke J.* [*McPherson C.B.* ed.], The Second Treatise of Government, 1980, para.8.
[12] *Wood G.*, The Creation of the American Republic 1776-1787, 1969, p. 163.
[13] *Madison J.*, The Federalist Papers, No: 43, 1788, p. 287.
[14] *Beitzinger A. J.*, A History of American Political Thought, 1972, p. 164.

very heart of the American society. And Georgians too, with some moderations, made the Lockean triad – life, liberty and property – the very cornerstone of the Constitution of 1921.

Simply speaking, natural rights originally belonged to men in the prehistoric (a condition before the state was established) 'state of nature'. Therefore, nobody could take them away, including the government established by people themselves. According to *John Locke*, humans were 'by nature free, equal and independent'. And natural law also required that 'no one ought to harm another in his life, health, liberty or possessions'.

American intellectual circles, as well as Georgians in the beginning of the 20th century, were ready to embrace the viability of undisputable rights of individuals. Perceived as immanent in the very structure of reality itself, exercising these rights transgressed all obstructive boundaries on the political landscape and acquired its natural place beyond vague civil regulations.

The US declaration and its theoretical keystone authoritatively set forth to an American faith or civil theology for Georgia, at the center of which the equal belief and the inviolable, individual rights reside. The US Declaration of Independence influenced reforms and developments all over the world. Although *Thomas Jefferson* himself minimized the Declaration's contribution to the political philosophy and described it merely as 'an appeal to the tribunal of the world', the succeeding American generations legitimately amplified its significance and 'turned to devise the institutional forms within which this freedom was to be assured'.[15]

VI. A WRITTEN CONSTITUTION

'In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.'[16]

Thomas Jefferson

The idea of a written constitution rightly belongs to the Americans. The Georgian founding fathers understood the importance of a written constitution well and luckily treated it far beyond that simple meaning. They did not only know that a written constitution would ensure the principles of democratic governance, the rule of law and the protection of fundamental human rights, but they also recognized that such a constitution would unify the nation.

[15] *Wood G.,* The Creation of the American Republic 1776-1787, 1969, p. 168.
[16] *Jefferson T.,* The Works of Thomas Jefferson: Correspondence 1793-1798, Volume VIII, p. 475.

It needs to be pointed out, that most Americans also precisely knew what their constitution stood for. 'Nothing was more common when any debate arouses on the principle of a bill, or on the extent of any species of authority, than for the members to take the printed Constitution out of their pocket, and read the chapter with which such matter in debate was connected,'[17] wrote *Thomas Paine* commenting on the constitution. 'It was as he had predicted in 1776: in America the law had become king.'[18]

Certainly, the 18th century was the time, as *John Adams* stated, '[W]hen the greatest lawgivers of antiquity would have wished to live'.[19] In that period New England became the epicenter of novel state building concepts. The espousal of various theoretical and practical elements acquired their unique shape in the new world. 'The idolatry of a constitution that *Thomas Paine* expressed so nicely in 1791 was the product of complicated series of changes in American thinking about politics that took place in Revolutionary years, no one of which was isolated.'[20] English constitutionalism, expressed in the common law tradition, attained inimitable connotation in American constitutionalism along with the natural law concept of unalienable human rights rooted in Roman law.

Furthermore, as referred above, the social contract theory elevated people to a higher level than any political power in civil society. Based on these preconditions, American constitutionalism unfolded in its exceptional mode, which 'stresses individual rights, consent of governed, the rule of law equally applied, institutional forms, separation of powers, checks and balances upon passions and interests and the conception of written constitution as 'higher law' to be interpreted ultimately not by natural or common reason but by those versed in the artificial reason of the law'.[21]

In a state of nature, according to *John Locke*, people already had property and other natural rights, which they reserved entering civil society. Thus, when people instituted government, these rights were not subject to any revision or abridgement. When entering civil society and delegating power to their communities, individuals were, according to *John Locke*, not 'so foolish, that they take care to avoid what mischiefs may be done them by pole-cats, or foxes; but are content, nay, think it safety, to be devoured by lions.'[22] Hence, each person surrendered the right to enforce the law of nature to the whole community, provided that any instituted authority preserves the fundamental law of nature – to preserve peace - and by doing so people retained their liberty which will not disrupt the achievement of this goal.

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[17] *Paine T.* [*Foner E.* ed.], Rights of Man, and Common Sense, Writings of Paine, 1995, p. 29.
[18] *Wood G.*, The Creation of the American Republic 1776-1787, 1969, p. 259.
[19] *Adams J.* [*Peek G.* ed.], Thoughts on Government, The Political Writings of John Adams, 1954, p. 92.
[20] *Wood G.*, The Creation of the American Republic 1776-1787, 1969, p. 259.
[21] *Beitzinger A. J.*, A History of American Political Thought, 1972, p. 3.
[22] *Locke J.* [*McPherson C.B.* ed.], The Second Treatise of Government, 1980, para. 93.

'The love of Power is so alluring…

that few have ever been able to resist its bewitching influence."[23]

Address at the New Hampshire Convention (1781)

There are several concepts about specific configurations of arranging political power, but a balance between individual liberties and peacemaking power in any given society is a paramount aim. Georgian founding fathers favored the parliamentary republic system, which differed from the political model of governance chosen by the Americans. Nevertheless, the Georgian Founding fathers managed to give their constituents enough power to control the delegated political power.

Reaching a perfect equilibrium between these ends rests largely on unbroken reciprocity and smooth cohabitation of individual rights and national goals. Thus, the algorithm of balancing two sets of interests inevitably entails dedication of both people and their representatives. Representation, accountability, impartiality, distribution of power, transparency – form a multilayered filter stabilizing immediate reflection of passions of various power holders on the political scale.

'When the legislative and executive powers are united in the same person,

or in the same body of magistrates, there can be no liberty.' [24]

Baron de Montesquieu

Although the three-fold power of government had been advanced by *Baron de Montesquieu*, 'it was Americans, however, in 1776 and more emphatically in the subsequent decade who were able to elevate this doctrine of the separation of three powers into what *James Madison* called in 1792 'first principle of free government''.[25] According to this principle, power has to be divided into three parts: legislative, executive and judiciary.

The Georgian constitution of 1921 shared these values and divided political power among the legislative, executive and judiciary branches. Most notably, the Georgian judiciary branch was granted the right of constitutional review, thus it resembled the US constitution in that regard.

Furthermore, each branch, according to the US constitution, was independent, had a separate function, and was barred from interfering with the functions of other branches. Moreover, the cooperation and competition between the power holders prevents a single branch of the government from accumulating excessive political power.

[23] *Bouton N.* (ed.), New Hampshire State Papers, Volume IX, 1867, p. 846.
[24] *Montesquieu B.* [*Newmann F.* ed.], Spirit of the Laws, Book XI, pp. 151-152.
[25] *Wood G.*, The Creation of the American Republic 1776-1787, 1969, p. 152.

'To resist encroachments of others',
'Ambition must be made to counteract ambition."[26]
James Madison

While the system of separation sets the legislative, executive and judiciary branches aside, the system of checks and balances keeps them interrelated. The separation of powers, as delineated by *James Madison* in the Federalist Papers, would be mere dissociation if not interconnected by the system of check and balances. 'Powers of government should be divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by others.'[27]

To put it simply, according to this principle, each branch acts as a restraint on the power of the others and at no time all power rest with a single branch of the government. For example, the president can either sign the legislation of the Congress, making it law or Veto it. The Congress, through the Senate, has the power of advice and consent on presidential appointments and can therefore reject an appointee. The courts, having the sole power to interpret the constitution, can uphold or overturn acts of legislature or rule on actions by the president.

'Where-ever law ends, tyranny begins.'[28]
John Locke

The Rule of Law is a steam engine for the American constitutional scenery. It plays an alleviating role between the power holders and maintains 'a government of laws, not of men'.[29] On the one hand it delineates powers and limits discretion of governmental authorities and on the other hand it safeguards individuals from encroachments of the state privileges. The Rule of Law principle is fairly associated with equal treatment aspiring to minimize arbitrariness while dealing with human rights in USA. It requires that all citizens were affected alike and to the same degree. 'Equal liberty and equal privileges are the happy effect of a free government.'[30] It facilitates free interaction of citizens and enhances the ability of every individual, family or group to maximize preservation, to secure individual rights and pursue happiness. Its clearness, fairness and transparence amplify reliability for its citizens on the state authorities and facilitate steady functioning of the governmental bodies.

[26] *Madison J.,* The Federalist Papers, No: 51, 1788.
[27] *Portsmouth N.-H.* Gazette, March 15, 1783; *Jefferson T.* [*Peden W.* ed.], Notes on the State of Virginia, 1996, p. 120.
[28] *Locke J.* [*McPherson C.B.* ed.], The Second Treatise of Government, 1980, para. 202.
[29] *Adams J.* [*Adams C. F.* ed.], The Works of John Adams, Volume 4, 1851, p. 106.
[30] *Wood G.,* The Creation of the American Republic 1776-1787, 1969, p. 401.

'So, enthralled have Americans become with their idea of a constitution as a written superior law set above the entire government against which all other law is to be measured that it is difficult to appreciate a contrary conception.'[31]

Georgian constitutionalism, as an example taken from the US constitutionalism, rests on genuinely shared values and hopes of its citizens. It is a true embodiment of the unity of civil spirit, strength and authority. Furthermore, amalgamated around common values, the Georgian founding fathers instituted a system that has its roots in both the people and the authoritative document, the Constitution of 1921, which as a result of the quest for independence would have become 'a political bible', as it has for Americans[32].

VII. NATURAL RIGHTS

'Freedom is the fence to my preservation.'[33]

John Locke

'The concept of natural rights was familiar to most Americans who took an interest in politics, and was taken as a self-evident truth by the men who led the Americans into the Revolution.'[34] The New England settlers made a decisive break with the past by pioneering a novel concept of natural rights that was inherently incompatible with the established tradition of classical natural law postulates. The US founding fathers upheld views of individuals as autonomous (rational) beings, and sidetracked from the old natural law notions on individuals as inherently sociable by nature. Furthermore, natural law discerned by the reason became the only path for individuals to obtain freedom. Moreover, all rights of individuals had to be sought being rooted in this retrospective.

New ideas about natural law and natural rights proved admirably suited for export, especially to the American colonies 'gathering settlers in the late seventeenth century'.[35] Pinpointing the age of *Thomas Hobbes* and *John Locke* in the 18th century, America as the era 'given currency'[36] to the natural rights was common. But the famous modifications to the natural right theories legitimately belong to the American intellectual leaders – the American founding fathers. Despite the varieties in terminology used to stress a distinction between alienable or unalienable, natural or acquired, natural or civil, one common ground for rights remained unchangeable in the new world: Natural rights

[31] *Wood G.,* The Creation of the American Republic 1776-1787, 1969, p. 260.
[32] *Paine T.* [*Foner E.* ed.], Rights of Man, and Common Sense, Writings of Paine, 1995, p. 29.
[33] *Locke J.* [*McPherson C.B.* ed.], The Second Treatise of Government, 1980, paras. 16-17.
[34] *Collier C., Lincoln J. C.,* Decision in Philadelphia, The Constitutional Convention of 1787, 1987, p. 333.
[35] *Collier C., Lincoln J. C.,* Decision in Philadelphia, The Constitutional Convention of 1787, 1987, p. 333.
[36] *Collier C., Lincoln J. C.,* Decision in Philadelphia, The Constitutional Convention of 1787, 1987, p. 333.

were those that could be derived from the natural liberty that individuals enjoyed in the state of nature.

Before these modifications took place, *Thomas Hobbes* sought a need to insert a fundamental distinction between 'a law of nature, *lex naturalis,'* which 'is a percept or general rule, found out by reason, by which a man is forbidden to do that, which is destructive of his life,' and 'the right of nature, *jus natural,*' and which 'is the liberty each man hath, to use his power, as he will himself, for the preservation of his own nature'.[37] Furthermore, the Lockean liberal interpretation of individuals' freedom even in the civil society gave a decisive mark to the US founding fathers to further build rational frame for rational individuals.

New generations of Americans strongly believed, as did *John Locke*, that 'reason…is that law'[38] of nature and man had a right to do that which was necessary to deal with the conditions of the state of nature – to support and protect his existence including 'the pursuit of happiness' as *Thomas Jefferson* substituted famous Lockean triad.

Although, the famous phrase 'the pursuit of happiness' never made its way into the Georgian constitution of 1921, it still sets the guarantees articulated by *John Locke*: life, liberty and property. All these fundamental rights were properly inserted into the Georgian constitution and the Georgia's founding fathers knew that by enjoying these rights, Georgians would become stronger in their quest for independence and in pursuing happiness.

'Life, liberty, and property.'[39]

John Locke

The Georgian constitution of 1921 guaranteed the rights to life, liberty and property, which had long been valued by then contemporary political philosophers and being incorporated into the constitutions of several progressive states. As for USA, these fundamental values became popular thanks to the works of *John Locke*, later recognized as the father of American political philosophy.

The right to life was considered to be a fundamental right for *John Locke*. Furthermore, all other rights were regarded as subordinate and 'necessary to and closely joined with a man's preservation'.[40] 'Natural reason…tells us that men…have a right to their preservation, and subsequently to meat and drink and such other things, as nature

[37] *Hobbes T.* [*Oakeshott M.* ed.], Leviathan, 1946), p. 84.
[38] *Locke J.* [*McPherson C.B.* ed.], The Second Treatise of Government, 1980, para. 6.
[39] *Locke J.* [*McPherson C.B.* ed.], The Second Treatise of Government, 1980, para. 87.
[40] *Locke J.* [*McPherson C.B.* ed.], The Second Treatise of Government, 1980, para. 23.

affords for their subsistence.'[41] Moreover the law of nature - reason, is a set of rules, that was not primary aimed to limit, but rather intended to stimulate the interest of preservation and the rights of humanity. Thus, the inevitable interest of every individual in self-preservation attained a body upon, which all other rights were to build on. Any set of rights, rules or laws, has to facilitate self-preservation and open venue to that end with any means that will not be destructive to others.

The preservation of property, which for *John Locke* includes 'life, liberty and estate', is extended in the concept of natural rights and cannot be weakened. 'Man, being born, as has been proved, with a title of perfect freedom, and an uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with any other man, or number of men in the world, hath by nature a power… to preserve his property, that is his life, liberty and estate, against the injuries and attempts of other men.'[42] The Founding fathers, comprehended property, similarly to *John Locke*, in its broadest sense, thus opening venue for various individual rights, among which the freedom of mind, conscience, religion and self-government were considered as the most fundamental rights. At the Virginia General Assembly of October 1785 *James Madison* argued in support of *Thomas Jefferson* that 'the equal right of every citizen to the free exercise of religion according to the dictates of conscience' is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature'.[43]

'My property rights in my knife allow me to leave it
where I will, but not in your chest."[44]
Robert Nozick

The freedom of each individual should be compatible with the freedom of others. Based on *Thomas Jefferson's* notion of 'rightful liberty' as 'unobstructed action according to our will within limits drawn around us by the equal rights of others', individual rights include rights involving motion, freedom of movement, migration, communication, commerce, work, and the enjoyment of its fruits. Furthermore, individuals should remain unobstructed in making their own maps of life at any given time. Although the state has to abstain from any unreasonable interaction and respect those most important rights of individuals, there are certain limits deduced from the abovementioned. Natural law serves as a fence to such limitations. The 'end of law is not to abolish or restrain, but to preserve and enlarge freedom'.[45]

[41] *Locke J.* [*McPherson C.B.* ed.], The Second Treatise of Government, 1980, para. 25.
[42] *Locke J.* [*McPherson C.B.* ed.], The Second Treatise of Government, 1980, para. 87.
[43] *Madison J.,* A Memorial and Remonstrance, reprinted in Meyers, Mind of the Founder, 1785, p. 9.
[44] *Nozick R.,* Anarchy, State and Utopia, 1974, p. 171.
[45] *Locke J.* [*McPherson C.B.* ed.], The Second Treatise of Government, 1980, para. 57.

John Locke asserted that 'every man has a property in his own person', namely 'this body has any right to but himself'. This meant that each person was a self-owner and the having of a the right of self-preservation was most compatible with the right of self-ownership. Self-ownership conveyed the idea of human autonomy. Because a man belongs to himself and is not subject to anyone else, except when he consents to it; he is naturally free, endowed with 'a liberty of acting according to his own will'. And because he owns himself and his actions, he can lawfully acquire property by his own labor.[46]

John Locke also stated that the Earth was common to all men. Besides, individuals could get hold of the items from the common property by contributing with their own labor - they could cultivate the land, plow it or take on other activities, provided that: a) there would be enough goods left for others to use (the conditions for other people should not worsen in the case, when every individual starts realizing their own right) and b) the distribution of quantity would stay within the limits of self-preservation. Aside from that, the format for the utilisation of property changed substantially and gained limitless capacity within scope of monetary denomination. Therefore, people were able to exchange items for money and accumulate as much wealth as they could. The liberal balance complied perfectly with individual property, self-preservation and preservation of mankind in this Lockean system.[47]

The Declaration of Independence of USA is the finest document of major political significance, through which natural rights persisted in the contemporary world. Natural rights, as perceived by Americans, are 'not abstractions, reasoning words on paper, but something' they 'deeply' and 'passionately' believe in.[48] They have proven to be the strongest fortress of American freedom. The right to life, liberty and the pursuit of happiness are gladly enjoyed by Americans and these rights are heartily passed on to the rest of the world as well.

VIII. CONCLUSION

On the eve of the 20th century, the Georgian constitution became one of the most novel documents in the South Caucasus. It did not only establish the tripartite separation of the political power, but it also fully embraced the fundamental values and rights shared by the then contemporary western community. Most notably, the Georgian constitution reflected many features of the US constitution, namely, the right to life, liberty and property. Moreover, the Georgian constitution of 1921 went even further and provided equal voting rights for men and women.

[46] *Locke J.* [*McPherson C.B.* ed.], The Second Treatise of Government, 1980, para. 21.
[47] *Locke J.* [*McPherson C.B.* ed.], The Second Treatise of Government, 1980, para. 21.
[48] *Collier C., Lincoln J. C.,* Decision in Philadelphia, The Constitutional Convention of 1787, 1987, p. 334.

By adopting a written constitution, along with the incorporation of fundamental rights and the concept of the separation of powers, the Georgian Constitution of 1921 established a new era of constitutionalism for Georgia, which is remarkably crucial for the statehood and the future development of democratic institutions. The Georgian Constitution of 1921 has legitimately become a great foundation for its modern successor – the Constitution of Georgia of 1995.

Malkhaz Matsaberidze[*]

THE 1921 CONSTITUTION OF GEORGIA: A SYMBOL OF THE INDEPENDENCE OF GEORGIA

ABSTRACT

The founders of the Democratic Republic of Georgia (1918-1921) considered the drafting of the basic law of the country, the Constitution, to be particularly important and saw its adoption as the most significant event after the Declaration of Independence. The Constituent Assembly of Georgia (1919-1921) drafted and adopted the Georgian Constitution on 21 February 1921, which holds its honorable place in the history of world constitutionalism. It is based on two basic principles – the freedom of the nation and the freedom of an individual. The Constitution provided solid foundation for the development of the Georgian state with its coherent democratism. In Soviet times, the 1921 Constitution was a symbol of what the Georgian State should have been like. And after the restoration of independence, it was indisputable, that the 1921 Constitution had to serve as the basis for the new constitution of the country.

I. DRAFTING THE CONSTITUTION – THE MAIN TASK OF THE CONSTITUENT ASSEMBLY

The process of the drafting and adoption of the Constitution lasted for almost the whole period of existence of the Democratic Republic of Georgia. The working process of the basic law of the country had started even before the Declaration of Independence. During the short period of the existence of the Transcaucasian Federation (from 22 April to 26 May 1918), the National Assembly of Georgia instructed the group members, who were elected from Georgia and were working on the Transcaucasian Constitution, to also start working on the Constitution of Georgia, as it became clear, that the Constitution of the Federation could not be written until the constitutions of the subjects appertaining to the Federation would be established.

The Transcaucasian Federation was dissolved soon after and the National Assembly of Georgia (hereinafter the 'Parliament of Georgia') elected the Constitutional Commission (from 6 June 1918 to 8 March 1919), the working materials of which were passed on

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to the Constitutional Commission of the Constituent Assembly (from 18 March 1919 to 21 February 1921)[1]. However, the Constitutional Commission of the Constituent Assembly decided to start working from scratch.[2]

In view of the composition of the Constituent Assembly, which was dominated by the Georgian Social Democratic Workers' Party,[3] the drafting and adoption of the Georgian Constitution practically fell into the hand of one political party. In spite of their own socialist ideology and the revolutionary sentiments felt by the parts of masses, the Georgian Social Democrats separated themselves from those political actors, who called for an immediate start of the 'building of socialism'. In the opinion of the Georgian Social Democrats, there were no conditions in the country to render the start of socialist transformations possible and the presence of socialists in the government had to be used for the building of a coherent democratic republic in Georgia.

The first Chairman of the Constitutional Commission, the Minister of Justice of the Democratic Republic of Georgia, *Rajden Arsenidze* provides interesting information about the work of the Commission: 'As we started to write the draft constitution, we had the constitutions of every rights-based democratic republic of the world in hand. We worked almost incessantly, day and night. Every article, every provision, every idea led to lots of debate and even conflicts, but in the end, we would reach an agreement, because every member of the Constitutional Commission was fully aware and treated this very responsible task with complete seriousness. It should be noted that we have adopted many basic ideas from the Constitution of Switzerland and adjusted them to the reality of Georgia; However, we have also taken some principles from the constitutions of the other rights-based democratic states.'[4]

[1] At its third sitting, on 18 March 1919, the Constituent Assembly elected 15 members of the Constitutional Commission, along with the other commissions. The Commission was composed of the representatives of the party factions of the Constituent Assembly. The Social Democrats had 10 members in the Commission. The National Democratic and the Socialist Federalist Parties had two members each, whereas there was only one Socialist Revolutionary in the Commission. The formation of the Commission was not subject of debate. The factions had determined their candidates in advance. The Social Democratic Party representatives in the Commission were *R. Arsenidze, S. Japaridze, P. Sakvarelidze, L. Natadze, V. Japaridze, K. Andronikashvili, R. Chikhladze, M. Rusia, G. Pagava* and *P. Tsulaia*; the National Democratic Party representatives were *S. Kedia* and *G. Gvazava*; the Socialist Federalist Party representatives were *I. Baratashvili* and *G. Laskhishvili*; the Socialist Revolutionary Party representative was *I. Gobechia*. Later on, the representatives of the new factions were added to the Constitutional Commission as well, namely *G. Veshapeli* from the National Party and *T. Avetisian* from the Dashnaks.

[2] It seemed easy to ensure continuity in the work of the Constitutional Commission, since the Commission was still dominated by the Social Democratic Party members and several members of the Constitutional Commission of the Parliament (*S. Japaridze, P. Sakvarelidze, R. Arsenidze*) were also elected in the Constitutitional Commission of the Constituent Assembly.

[3] As a result of the elections of February 1919, 109 out of the 130 members of the Constituent Assembly were Social Democrats. After two additional elections the number of the Social Democrats was reduced to 102, however this did not change the balance among political actors represented in the Constituent Assembly.

[4] *Inasaridze K.*, The Short 'Golden Age', Democratic Republic of Georgia 1918-1921, Radio Documentation

The fundamental principles of the Georgian State were set forth in the Act of Independence of 26 May 1918. According to the decision of the Constitutional Commission, not only did the principles stipulated in the Act of Independence serve as the basis for the relevant articles of the Constitution, but the Act of Independence itself had to be attached to the Constitution as an introductory part. *Giorgi Gvazava* commented that the Act of Independence 'is the birth of our state', '... it is a fact from which our rights emanate and flow...'.[5]

The issue addressed firstly was the meaning of the 'democratic republic',[6] the foundation of which was declared in the Act of Independence. All the parties delivered their opinions on this issue. The matter was resolved on the basis of the vision of the representatives of the Social Democratic Party, which believed in the synthesis of two forms of the democratic republic, namely the direct and the parliamentary democracy.

It was decided to divide the constitution into chapters, and chapters - into separate articles. The members of the Commission assigned to the drafting of different chapters worked on them independently and afterwards their drafts were presented to the Constitutional Commission, which discussed them at its sittings.[7]

II. MEASURES TO ACCELERATE THE WORK ON THE DRAFT CONSTITUTION

The drafting of the Constitution by the Commission was delayed, which concerned the opposition parties. In October 1919 the faction of the National Democrats in the Constituent Assembly raised the issue before the Presidium of the Constituent Assembly in order to demand the Constitutional Commission to submitt the Draft Constitution within one month. The Faction stated that it was the main function of the Constituent Assembly to draft the Constitution and there was still no progress in this regard despite the passing of 7 months. Due to the internal as well as the foreign conditions, it was necessary to hasten the drafting of the Constitution. From the perspective of the internal situation in the country, it was expected, that 'such a historical act will put the internal

(Munich), 1984, pp. 254-255 (in Georgian).

[5] The Central State Historical Archive of Georgia, Foundation 1833, Directory #1, File no. 859, p. 139 (in Georgian).

[6] The Central State Historical Archive of Georgia, Foundation1833, Directory #1, File no. 181, p. 17 (in Georgian).

[7] The initial outline of the Draft Constitution looked as follows: 1. General Provisions *(R. Chikhladze, P. Sakvarelidze)*; 2. State Territory *(P. Sakvarelidze, R. Chikhladze)*; 3. Rights and Duties of Citizens of the Republic of Georgia *(K. Japaridze)*; 4. Army of the Republic *(K. Andronikashvili)*; 5. State Finances *(Sp. Kedia)*; 6. Judiciary *(I. Baratashvili)*; 7. The State and Church *(L. Natadze)*; 8. Local Self-Government *(M. Rusia)*; 9. Parliament; 10. Public Officials *(P. Sakvarelidze, R. Chikhladze)*; 11. Rights of National Minorities *(G. Laskhishvili)*; 12. Revision of the Constitution *(G. Naneishvili)*; 13. Right to vote *(G. Pagava, P. Tsulaia).*

life of our country on the path of peace, raise awareness of the people about their rights and establish propriety in the country'.[8]

The National Democratic Faction asserted that the adoption of the Constitution would be even more important from an international perspective. It was up to the victorious states of the First World War to recognize or not to recognize the newly founded states, including Georgia. The support of the Western countries would be granted to those newly founded states, whose 'national spirit and will' would be directed towards 'the formation of a rights-based state and the establishment of propriety instead of anarchy and civil war'.[9]

As a response, the Chairman of the Constitutional Commission at the time, *Rajden Arsenidze,* declared that the work on the Draft Constitution was reaching its end and the 'major part of the Constitution was already drafted'. He promised the Constituent Assembly that the Draft Constitution would be submitted to it in January 1920.[10] Moreover, the Constitutional Commission decided to present the already drafted chapters of the Constitution to the public for its feedback.[11] According to this decision, the following chapters were published in 1919 in the 285th and 298th issues of the newspaper 'Republic of Georgia': 1. Executive branch; 2. Rights of the citizen; 3. Social rights; 4. Learning and Education; 5. Relationship of the sexes, 6. Armed forces of the Republic; 7. Judiciary; 8. State and Church; 9. Local Governments and 10. Public Officials.

In January 1920 the Social Democratic Faction of the Constituent Assembly demanded sternly from the Constitutional Commission to accelerate its work on the Constitution.[12] The Presidium of the Constituent Assembly expressed its concerns as well. On 7 February 1920 the Constitutional Commission was sent a special address, in which the Presidium reminded the Commission of the promise to finalize the work on the Draft Constitution in January 1920 and noted that 'January has passed, but there are no signs of the submission of the draft to the Constituent Assembly; neither it is clear to the Presidium, when we can expect its submission'.[13]

The work of the Commission was indeed seriously flawed. The progress of the work was clearly unsatisfactory. For example, on 24 December 1919, they started discussing the

[8] The Central State Historical Archive of Georgia, Foundation 1836, Directory #1, File no. 46, p. 3 (in Georgian).
[9] The Central State Historical Archive of Georgia, Foundation 1836, Directory #1, File no. 46, p. 3 (in Georgian).
[10] The Central State Historical Archive of Georgia, Foundation 1833, Directory #1, File no. 191, p. 67 (in Georgian).
[11] The Central State Historical Archive of Georgia, Foundation 1833, Directory #1, File no. 180, p. 31 (in Georgian).
[12] The Central State Historical Archive of Georgia, Foundation 1833, Directory #1, File no. 180, p. 62 (in Georgian).
[13] The Central State Historical Archive of Georgia, Foundation 1833, Directory #1, File no. 191, p. 67 (in Georgian).

provisions on 'social rights', they reached Article 7 and postponed the rest for the next sitting. However, they returned to the discussion of this issue only on 4 February 1920. On 24 January 1920, *Pavle Sakvarelidze* proposed to collect all the materials prepared by the Commission and to print the Draft Constitution, which would be distributed among the members of the Commission and the factions. Moreover, he proposed to ascertain 'which issues were still unconsidered'[14]. The Commission accepted this proposal unanimously.

Certain organizational changes were also carried out in the process. The Chairpreson of the Constitutional Commission, *Rajden Arsenidze* was appointed as the Minister of Justice. Therefore, the issue of his subsititution with a new member from the Social Democratic Faction and then the election of the new Chairperson of the Commission was raised at the sitting of 24 January 1920.[15] On 30 January 1920, *Rajden Arsenidze* was replaced by *Konstanstine Japaridze* as a member of the Constitutional Commission.[16] However, *Rajden Arsenidze* continued his active participation in the work of the Constitutional Commission.

At the sitting of 4 February 1920, *Pavle Sakvarelidze* was elected as the Chairperson of the Constitutional Commission and *Sergi Japaridze* was elected as his associate.[17] The changes led to improvements in the work of the Commission. The records of the Constitutional Commission serve as evidence of the improvement. They are well-structured, re-printed and often edited by the Chairperson.

In order to alleviate the dissatisfaction caused by the delays in preparation of the Draft Constitution, the Constitutional Commission decided once again to publish those chapters of the draft that were ready at the moment. The following chapters were published in the issue of 17 February 1920 of the newspaper 'Republic of Georgia': 1. State Finances; 2. State Territory; 3. General Provisions; 4. The Parliament; 5. Citizenship.

It is noteworthy, that from the end of January to the beginning of April 1920, the same newspaper published a series of letters of *Pavle Sakvarelidze* on the Constitution of Georgia. These were commentaries on the basic provisions of the already published chapters of the Draft, aimed at raising public awareness on the constitutional issues. In spring 1920, the Constitutional Commission focused on the elaboration of a special chapter on the rights of minorities, which turned out to be quite time-consuming.

[14] The Central State Historical Archive of Georgia, Foundation 1833, Directory #1, File no. 181, p. 64 (in Georgian).
[15] The Central State Historical Archive of Georgia, Foundation 1833, Directory #1, File no. 181, p. 65 (in Georgian).
[16] The Central State Historical Archive of Georgia, Foundation 1833, Directory #1, File no. 181, p. 411 (in Georgian).
[17] The Central State Historical Archive of Georgia, Foundation 1833, Directory #1, File no. 181, p. 66 (in Georgian).

III. THE FINAL EDITING OF THE DRAFT CONSTITUTION BY THE CONSTITUTIONAL COMMISSION

At the sitting of 14 February 1920, the Constitutional Commission debated the system of the structural arrangement of the Constitution. *Pavle Sakvarelidze* proposed to divide the Constitution into chapters and than into Articles. According to him, 'such a system should be considered the best in order to avoid ambiguity'.[18]

On the sitting of 6 March 1920, the Constitutional Commission elected the so-called Minor Commission, composed of *Akaki Chkhenkeli, Pavle Sakvarelidze* and *Giorgi Gvazava*. The Minor Commission also invited the former Chairmen, the Minister of Justice, *Rajden Arsenidze*. It was the task of to the Minor Commission 'to revise the Constitution, to review the feedback and to systematize them'. The Minor Commission had to submit the reviewed materials periodically to the bigger Commission for its final decision.[19] The 'revision' implied the re-consideration of the already drafted parts of the Constitution for their further amendment. It was decided to carry out this work by chapters and the authors of the chapters had to be informed in advance about the discussion of the respective chapters.

At the sitting of of the Constitutional Commission of 6 March 1920, an Editorial Commission was formed along with the Minor Commission. The task of the former was to make editorial changes to the Draft Constitution. The Editorial Commission was composed of *Akaki Chkhenkeli, Pavle Sakvarelidze* and *Giorgi Gvazava*. Moreover, the prominent activists, like *Kirile Ninidze, Ivane Javakhishvili, Ivane Gomarteli, Grirgol Kipshidze, Ekvtime Takaishvili, Varden Kipiani* and *Ivane Karichashvili* were invited to the Commission get involved in its work.

At the sitting of the Constitutional Commission of 21 April 1920, when the work on the Draft Constitution was close to its end, the issue of its publication was raised. Previously the Commission had decided to publish the Draft Constitution together with its commentary. At that point, the commentaries on every chapter were not available. It is noteworthy, that the Commission deemed it particularly important to publish the commentaries on the Constitution. As *Pavle Sakvarelidze* stated, that 'the commenatries will be particularly important material for the history and moreover, it will make it easier for the public presently to learn about the Constitution and become acquainted with it'.[20]

[18] The Central State Historical Archive of Georgia, Foundation 1833, Directory #1, File no. 180, p. 160 (in Georgian).
[19] The Central State Historical Archive of Georgia, Foundation 1833, Directory #1, File no. 181, p.139 (in Georgian).
[20] The Central State Historical Archive of Georgia, Foundation 1833, Directory #1, File no. 181, p. 210 (in Georgian).

All the members of the Commission shared the opinion, that the commentaries had to be published by all means. Therefore, the previous resolution on the publication of the commentaries was maintained. However, at the same time they decided to print the Constitution 'as a draft, without its commentaries'[21], since the commentaries were not finished at that time.

At the sitting of 22 May 1920, the Constitutional Commission made the final decision to 'print the Draft Constitution without commentary for its presentation to the public'[22] and asked the respective permission from the Presidium of the Constituent Assembly. The first reading of the text of the Draft Constitution, edited by the Editorial Commission, was carried out at the sitting of the Constitutional Commission of 2 June 1920. On the same day, it was decided not to make any additional amendments to the text and 'submit the Constitution for print today'. The Minor Commission was assigned with the task to proofread the typeset and enter the necessary amendments in the print-ready text of the Constitution.[23]

On 8 June 1920, the Constitutional Commission submitted the printed Draft Constitution to the Presidium of the Constituent Assembly, delivered from the printing house. The Commission noted that they had also drafted an explanatory note with approximately 300 pages. However, it would take a long time to print the explanatory note, as it still required proofreading and some content-wise revision. Since the 'submission of the Draft Constitution for review has already been late', it was decided to print only the Draft Constitution at the moment and leave the 'explanatory note project' unpublished. However, it was noted that the explanatory note could be considered 'as a material, which can be published later and can be used presently for the clarification of various issues'.[24] It is noteworthy that the full text of 'the explanatory note project' is not available in the materials of the Constitutional Commission, however, it can be assumed, that the commentaries on the separate chapters of the Constitution, that were saved in these materials, were parts of that note.

On 9 June 1920, the Presidium of the Constituent Assembly considered the Draft Constitution submitted by the Constitutional Commission and ordered that 'as soon as it is printed, the Draft Constitution should be sent to the factions of the Constituent Assembly, its every member, the government and the agencies'.[25] Besides, a separate

[21] The Central State Historical Archive of Georgia, Foundation 1833, Directory #1, File no. 181, p. 210 (in Georgian).
[22] The Central State Historical Archive of Georgia, Foundation 1833, Directory # 1, File no. 181, p. 249 (in Georgian).
[23] The Central State Historical Archive of Georgia, Foundation 1833, Directory #1, File no. 181, p. 265 (in Georgian).
[24] The Central State Historical Archive of Georgia, Foundation 1833, Directory #1, File no. 181, p. 136 (in Georgian).
[25] The Central State Historical Archive of Georgia, Foundation 1833, Directory #1, File no. 863, p. 22 (in Georgian).

decision had to be adopted on the issue of the submission of the Draft Constitution to the Constituent Assembly for deliberations.

The Draft Constitutionm published in June 1920, consists of 17 chapters and 166 Articles. The Constitutional Commission paid particular attention to the structure of the Draft. As *Pavle Sakvarelidze* noted, the Constitutional Commission aspired 'to align the contents of the chapters of the Constitution of Georgia with their titles, to devise simple and clear structure and to also ensure that it is easy to study'.[26] The structure of the Draft Constitution was adopted without further amendments by the Constituent Assembly.

After the publication of the Draft Constitution and the discussion of the constitutional issues at the Second Convention of the Social Democratic Party, a part of the leadership of the Party formed an opinion, that the deliberations on the Draft Constitution by the Constituent Assembly had to be launched immediately. On 8 July 1920, it was decided at the sitting of the Central Committee Presidium of the Social Democratic Workers Party of Georgia, chaired by *Noe Ramishvili* (and attended by *Aleksandre Lomtatidze, Ioseb Salakaia, Vasil Tsuladze, Ilia Badridze, Silibistro Jibladze*), that the Constituent Assembly 'should launch the deliberations on the Constitution and the budget immediately'.[27]

The issue was raised again at the sitting of the Central Committee of 11 July 1920 (attended by *Noe Ramishvili, Aleksandre Dgebuadze, Vasil Tsuladze, Ioseb Salakaia, Evgeni Gegechkori, Seit Devdariani, Bagrat Mikirtumovi, Noe Khomeriki, Silibistro Jibladze, Noe Zhordania, Akaki Chkhenkeli*). *Evgeni Gegechkori* called for an immediate start of the deliberations on the Draft Constitution by the Constituent Assembly, as the adoption of the Constitution was important for 'the foreign affairs' and would help the legal recognition process of Georgia.[28] *Noe Zhordania* opposed this proposal and stated, that it would be impossible to immediately start the consideration of the Draft Constitution due to several reasons: (a) other political parties were not ready to start deliberations on the Draft Constitution and for that reason they 'oppose the start of deliberations now'; (b) it was questionable wheter they would be able to have the necessary quorum, as the representatives of other parties in the Assembly could 'all go on vacation now', then it would be necessary to have the ministers attend the sittings in order to constitute a quorum; (c) moreover, it would be 'absolutely impossible' that only the representatives of the Social Democrats consider and adopt the Constitution without the participation of other parties, as it would lead to 'much dispute and discontent in the parties'; (d) it was also necessary to initiate a press campaign before starting the deliberation on the

[26] See the newspaper 'Republic of Georgia' of 8 February 1920 (in Georgian).

[27] The Central State Historical Archive of Georgia, Foundation 1825, Directory #1, File no. 130, p. 92 (in Georgian).

[28] The Central State Historical Archive of Georgia, Foundation 1825, Directory #1, File no.129, p. 52 (in Georgian).

Constitution and 'there should be written a lot' about the issue. Due to these reasons, *Noe Zhordania* declared that 'the Government postponed the deliberations on the Constitution'.[29]

Other members also participated in the debate and it appeared, that the majority of the leadership of the Social Democratic Party opposed the postponement of the deliberations. Thus, it was decided, that the deliberation should 'not to be postponed. Deliberations should start now. There should be general debates, followed by the statements of our factions about the amendments and then the Commission will be instructed on further work'.[30] However, at the end, the attempt to immediately start deliberations on the Draft Constitution by the Constituent Assembly appeared to be futile.

IV. BEGINNING OF THE DELIBERATIONS ON THE DRAFT CONSTITUTION BY THE CONSTITUENT ASSEMBLY

The Rules of Procedure of the Constituent Assembly did not provide for a special rule for the deliberations on the Draft Constitution. Therefore, when the issue of the deliberations on the Draft Constitution appeared on the agenda, it raised the question whether to they should consider the Draft Constitution by the same rule applicable to ordinary laws, or to adopt separate procedural rules. Finally, it was decided that the Draft Constitution had to be adopted not in three readings, which was an ordinary rule, but in five readings.[31]

On 24 November 1920, at the extraordinary 59th sitting of the second session of the Constituent Assembly, the deliberations on the Draft Constitution started. The Chairperson of the Constitutional Commission, *Pavle Sakvarelidze* delivered the speech, which was followed by the extensive speeches of the representatives of the parties. The main political actors of Georgia had formed an official stance on the project of the Draft Constitution after the sitting of the Constituent Assembly of 8 December 1920.

The first sittings devoted to the deliberations on the Constitution demonstrated, that the deliberations would take a long time and holding one sitting per week would not

[29] The Central State Historical Archive of Georgia, Foundation 1825, Directory #1, File no.129, p. 52 (in Georgian).

[30] The Central State Historical Archive of Georgia, Foundation 1825, Directory #1, File no.129, p. 53 (in Georgian).

[31] The first reading - General deliberations on the basic rules of the Constitution; The second reading – General deliberations on the basic provisions of individual chapters of the Draft Constitution; The third reading – Article-by-article deliberations of the individual chapters; The fourth reading – Deliberations on the amendments and corrections offered to eradicate the conflicts across various chapters; The fifth reading – Final editing of the full text. There had to be a 10-day interval between the second and the third readings, which could be used for the deliberations on the separate chapters.

be enough. Therefore, to accelerate the deliberations on the Draft Constitution, it was decided unanimously by the joint sitting of the Presidium and the representatives of the factions of the Constituent Assembly on 7 December 1920, that in addition to Wednesday, one more day had to be devoted only to the deliberations on the Constitution. They chose Sundays as such a day, namely the period from 12 to 3 p.m. Tuesdays would still be devoted to the ordinary legislative issues, Fridays – to the urgent issues and if there would be any time left, that time would also be used for the deliberations on the Constitution.[32] This addition to the rule of deliberations on the Constitution was approved by the Constituent Assembly at its sitting of 7 December 1920. [33]

V. DEBATING THE ORGANIZATION OF THE CENTRAL GOVERNMENT

The presentation of the Constitutional Commission practically expressed the position of the Social Democratic Party, but there were number of fundamental issues on which there was no uniform opinion in the party, as evidenced by the speech of *Noe Zhordania*. He emphasized the basic issues of the state organization and severely criticized the respective part of the Draft Constitution. Firstly, he considered it impossible to reconcile the institutions of the direct democracy, such as referendums and legislative initiatives, with the parliamentarism. In the parliamentary systems, the government is formed and dissolved at the will of the majority in the parliament. The parliamentary system implies governmental crises, which may be evoked by the disagreement with parliament even on the small, practical issues. If the parliament approves of the general policy direction of the government, in case of the disagreement on separate issues, the government has to obey and execute the resolutions of the parliament.

The second important controversy in the draft according to *Noe Zhordania's* opinion, was the negation of the functions of president. He stated, that the presented system, 'is a true offspring of parliamentarism... the presence of a president is indispensable for parliamentarism'. For example, in the case of governmental crisis, the president continues to function and makes the necessary decisions. *Noe Zhordania* believed, that 'parliamentarism and the systems of democracy' had to be synthesized in such a manner that would allow overcoming the inherent flaws of the draft. He considered it necessary to elect the head of the government for a fixed term, who would also 'function as a president and representative of the state'. During the general deliberations on the Draft Constitution, the debates were mostly structured around the issues raised by *Noe Zhordania*. Moreover, the representative of the National Democratic Faction, *Giorgi*

[32] The Central State Historical Archive of Georgia, Foundation 1833, Directory #1, File no. 863, p. 84 (in Georgian).
[33] The Central State Historical Archive of Georgia, Foundation 1833, Directory #1, File no. 736, p. 226 (in Georgian).

Gvazava further emphasized these very issues in his speeches and categorically called for the introduction of the institution of president.

VI. CONSIDERATION OF THE PROPOSALS OF THE FACTIONS ON THE DRAFT CONSTITUTION AND THE ALTERNATIVE DRAFT OF THE SOCIALIST-REVOLUTIONARIES (SRS)

According to the rule of the deliberations on the Draft Constitution, the factions submitted their amendments to the Presidium of the Constituent Assembly by chapters in the fixed time. These amendments were later sent to the Constitutional Commission for their opinion. The Constitutional Commission considered the proposals of the factions at its sittings and found some of them acceptable (mostly those initiated by the Social Democratic Party). The proposals of the factions, together with the opinion of the Constitutional Commission, were sent to all factions prior to the article-by-article deliberations on the respective chapters to finally determine what part of them would be adopted. In view of its composition, the Constituent Assembly mostly adopted those amendments that were submitted by the Social Democratic Party.

At the sitting of the Constituent Assembly of 15 December 1920, *Ilia Nutsubidze* submitted the Draft Constitution prepared by the Socialist Revolutionaries (referred to as 'SRs') and by doing so, the SRs have chosen the path of full negation of the draft prepared by the Constitutional Commission. It appears, that the SRs hoped, the Constituent Assembly would hold deliberations on both drafts equally and this would provide an opportunity for their party to clearly separate themselves from other parties, to improve their reputation in public and to create an impression that their project was the true expression of the interests of the people.

The alternative draft presented by the SRs was denounced not only by the Socialist Democrats, but also by other parties (from 12 to 13 February 1921). It was decided that the draft submitted by the SRs would not be considered by the Constituent Assembly. The SRs faction could propose the relevant amendments during the deliberations on the Draft Constitution.

VII. DEBATE ON THE PROCEDURE OF ADOPTION OF THE CONSTITUTION

During the deliberations on the Draft, the heated debate took place on the issue of who would adopt the Constitution. There were two opinions established: 1. The Constitution had to be adopted by the Constituent Assembly, 2. In order to adopt the Constitution, a referendum had to be held – the fate of the Constitution had to be decided by the people. There were arguments on both sides. The supporters of a referendum argued, that it

would be an extremely democratic and logical step to approve the Constitution through a referendum. If the amendments to the Constitution could 'only enter into force after the approval by the majority of the people' (Article 147 of the Constitution), then the adoption of the Constitution itself should also require the approval of the people.

The Socialist Federalist *Samson Dadiani* supported holding a referendum and stated, that if the people were entitled to amend the Constitution, it 'would be illogical not to ask the very same people in the beginning, whether they want this constitution', as the people are the 'only holders of sovereignty'. Therefore the 'Constituent Assembly cannot grant anything to the people, since the powers of the Constituent Assembly itself are delegated from the people'.[34] The adoption of the Constitution through a referendum was categorically demanded by SRs, as they hoped that the draft prepared by the Commission would be dismissed by the people and this would create a momentum for the draft prepared by their party.

However, the majority of the Constitutional Commission was made up of the opponents of the referendum. In their view, the Constituent Assembly was elected exactly for the adoption of the Constitution. The decision of the issue was certainly depending on the position of the Social Democratic Party. The Conference of the Social Democratic Party of Georgia (from 19 to 20 January 1921) decided that it was necessary to accelerate the adoption of the Constitution and therefore it ultimately dismissed the idea of holding a referendum.[35] However, in the end the Constituent Assembly had to adopt the Constitution under such circumstances, which most probably nobody could have predicted.

VIII. WHEN WOULD THE CONSTITUENT ASSEMBLY FINISH THE DELIBERATIONS ON THE CONSTITUTION?

In January-February 1921 the Constituent Assembly of Georgia continued the deliberations on the Draft Constitution. The Social Democratic Party, which was in power in the Democratic Republic of Georgia and had constitutional majority in the Constituent Assembly, could finish the deliberations on the Draft Constitution relatively fast and adopt it, but the leadership of the Democratic Republic of Georgia considered the in-depth and long deliberations on the Constitution to be a fundamentally important political event for the country.

The deliberations on the Draft Constitution were protracted. On 20 January 1920, the Conference of the Social Democratic Party demanded the governing bodies of the party to finish the deliberations on the Constitution 'no later than two months'.[36] Thus,

[34] See the newspaper 'Popular Affairs' of 21 October 1920 (in Georgian).
[35] See the newspaper 'Unity' of 23 January 1921 (in Georgian).
[36] See the newspaper 'Unity' of 23 January 1921 (Nr. 16), p. 2 (in Georgian).

the deliberations on the Constitution and its adoption had to end before mid-March 1920 and the Social Democratic Faction in the Constituent Assembly had to follow this decision. It is not beyond the realm of possibility that the Constitution would be adopted on 12 March 1921, on the day of the third anniversary from the time that the Constituent Assembly started its work.[37] By finally adopting the Constitution, the Constituent Assembly would accomplish its mission.

Whether it had been March 12th or any other day, the Constitution would by all means be adopted in spring 1921, which would be followed by the parliamentary elections pursuant to the Constitution in autumn. The further developments would be determined by the Constitution. Article 61 of the 1921 Constitution states: 'The Parliament starts its work on the first Sunday of November, every year. The elections of the new parliament will be held in autumn, at the same time in the whole Republic, presuming that the newly elected members will attend the opening of the Parliament.'

Before the summoning of the new Parliament, the Constituent Assembly of Georgia would continue to function. This issue was addressed in Article 149 of the Constitution: 'Until the first meeting of the first Parliament, the Constituent Assembly will fullfil the function of the Parliament.'

The first Sunday of November 1921 was November 6th. If the Soviet occupation had not occured, this would be an important date in the life of the Democratic Republic of Georgia and it would enter the history of Georgian parliamentarism. But in reality, November 6th of 1921 turned out to be another blank Soviet day. One could feel the expectation of the anniversary of the 'Great October Revolution' in the Soviet newspapers issued on that day and the anniversary was celebrated the next day in Georgia, as well as in the rest of the Soviet Union.

IX. THE BEGINNING OF THE WAR OF FEBRUARY-MARCH OF 1921, THE ADOPTION AND PUBLICATION OF THE CONSTITUTION

The first Constitution of Georgia was not adopted hastily, as it was stated in the Soviet times[38] and this phrase has been circulating in some articles and the works of the scholars until now. The 1921 Constitution was not a rushed document. The Draft Constitution

[37] The opening of the Constituent Assembly of Georgia was coincided with the anniversary of the Russian February Revolution. Symbolically, this declared the fact that Georgia stayed loyal to the democratic ideals of the February Revolution.

[38] For example, *G. A. Eremov* wrote the following on this matter: 'The Constitutient Assembly hastily approved the Draft Constitution at the evening sitting ... Only four of its chapters were deliberated article by article and other chapters were approved without deliberations. Even the rules that they adopted for the approval of the Constitution were violated.' *Eremov G.A.*, The Stages of the Development of the Constitution of the Soviet Georgia (Stalin Tbilisi State University Publishing, Tbilisi), 1960, p. 110 (in Georgian).

had been developing for a long time and its deliberations had been ongoing in the Constituent Assembly since 24 November 1920. The agenda of the sitting scheduled on 16 February 1921 included the chapters 7-15 of the Draft Constitution for the article-by-article deliberations, whereas the last two chapters of the Draft had to be deliberated upon on February 17th. This would end the article-by-article deliberations of the Draft. As for the eradication of the possible conflicts across the chapters and the final editing of the overall text, the Constituent Assembly would not need a long time. However, the normal progression of the deliberations on the Draft Constitution was disrupted by the invasion of the Red Army of the Soviet Russia. The Democratic Republic of Georgia was subjected to a deadly threat.

The beginning of the war, the battles occurring close to Tbilisi, naturally affected the work of the Constituent Assembly. The deliberations on the Draft Constitution were further accelerated. The speakers, as it was noted in the press of that time, tried to express their positions in the succinct and precise manner. On 21 February 1921, the Constituent Assembly of Georgia unanimously adopted the Constitution of the Democratic Republic of Georgia at its extraordinary sitting and accomplished its mission. Later, the member of the Constituent Assembly, *Giorgi Gvazava* recalled: 'The Constituent Assembly continued to work ardently, even when the city was under the attack of the Russian Army, you could hear the cannons and bombs exploding in the sky... We dissolved only in the morning, when we had finally approved our Constitution – the basic laws of the Georgian Republic.'[39]

On the next day, on 22 February 1921, the Constituent Assembly of Georgia approved the French translation of the Constitution of the Democratic Republic of Georgia, which was printed later in France. It has an inscription: 'The French translation was approved by the Constituent Assembly on 22 February 1921.' There is no other information available about the sitting of the Constituent Assembly of 22 February 1921.[40]

Article 11 of the 1921 Constitution stated: 'After its approval and adoption, the Constitution should be published by the Constituent Assembly along with the signatures of its members.' However, there was no time to print the Constitution in Tbilisi. The Government of Georgia fled first to Kutaisi, where the Constituent Assembly held its sitting on February 28th and then spent the period from March 10th to March 17th in Batumi before emigrating from Georgia.

The Constitution was printed in Batumi, most probably, at the end of February or the beginning of March, when the Government was already in Batumi in the then famous printing house of *Nestor Khvingia*. The Constitution was entitled as follows:

[39] *Gvazava G.*, Georgia and the National Democratic Party (The Second Letter, Paris), 1928, p. 11 (in Georgian).
[40] *Iakobashvili I.*, On the French Translation of the 1921 Constitution of Georgia, in: 'Georgian Parliamentarism', Volume II, N1(3), 2020, pp. 28-29 (in Georgian).

'The Constitution of Georgia, adopted by the Constituent Assembly of Georgia on 21 February 1921.'

It turns out that *Nestor Khvingia* was the owner of the printing house, that was technically well-equipped by the standards of that time and in view of the books and newspapers printed by him, he seemed close to the ideology of the Social Democratic Party governing Georgia.[41]

X. THE ISSUE OF THE APPLICATION OF THE 1921 CONSTITUTION

It is often noted about the application of the 1921 Constitution in the scholar and journalistic works, that 'the 1921 Constitution had practically never been applied'. Such an argument depicts the reality, that the Constitution was adopted under the war and Georgia lost this war, the whole of the territory of the Democratic Republic of Georgia was occupied by the Soviet Russia and Turkey.

With regards to the application of the Constitution, it is stated sometimes that 'it was in force for only 4 days', so from the day of its adoption until February 25th, when the Georgian Army left Tbilisi. However, the war continued for another two weeks after the surrender of Tbilisi and the Democratic Republic of Georgia continued its existence. The Government of *Noe Zhordania* left Georgia after March 17th. *Karlo Inasaridze*, the prominent representative of the Georgian emigrants viewed the issue of the application of the 1921 Constitution in exactly same light. He stated that 'the application of the Constitution ceased in Georgia on 18 March 1921, when the Soviet Russian Red Army conquered the independent Georgia'. *Karlo Inasaridze* differentiated between the *de facto* and *de jure* application of the 1921 Constitution. He noted that 'the application of the Constitution of the independent Georgia has ceased *de facto* after the Bolsheviks took over our country, however *de jure* it is still in force'.[42]

What was the attitude of the people, who worked on the basic law of the land towards the issue of the application of the 1921 Constitution? The Constituent Assembly adopted and published the Constitution of Georgia, as a result the Constitution entered into force. Article 10 of the Constitution states: 'This Constitution is applicable at all times and incessantly, unless the Constitution itself states otherwise.' Such cases of the non-application were provided by Article 43, namely, in case of an insurgence or a war the Parliament was authorized to temporarily suspend certain guarantees of rights. Under

[41] *Sioridze M.*, The Place, Time and Circumstances of the Printing of the First Constitution of Georgia, in: 'At the Beginnings of the Georgian Constitutionalism – 90th Anniversary of the 1921 Constitution of Georgia (Materials of the Scientific Conference)', the Center for Research and Promotion of Constitutionalism, 2011, p. 47 (in Georgian).

[42] *Inasaridze K.*, The Constitution of Georgia and Its Roots, in the Collection: *K. Inasaridze*, Political Culture (Paris), 1992, p. 69 (in Georgian).

Article 44, in case of a widely spread epidemic the Government was allowed to suspend the application of several articles of the Constitution temporarily.

Once it became applicable, no one could suspend the 1921 Constitution entirely. It was allowed to suspend some of its articles in emergencies, to revise all of its articles as a result of constitutional amendments, except for the form of government, but it did not provide for the mechanism of its total suspension. The information widely spread in the Soviet scholarship, that the Constituent Assembly 'adopted the resolution on the temporary suspension of the Constitution of Georgia'[43] at its last sitting on 17 March 1921, is false. The Constituent Assembly had no power to suspend the Constitution.

Unfortunately, the stenogram of the last sitting of the Constituent Assembly was not found. However, that sitting and the resolution adopted on it, is mentioned in the memoirs of the Colonel *Aleksandre Zakariadze*, who did not mention anything about 'the temporary suspension of the Constitution':[44]

'The Constituent Assembly in Batumi has decided unanimously to send the national government of Georgia, headed by Noe Zhordania, abroad. He was allowed to form the coalition government with the following composition: two representatives of the Social Democrats, one representative of the National Democrats and one representative of the Socialist Federalist Party. Mr. Noe Zhordania was allowed to take the specialists and persons important for his work with him.

The Government was assigned with the task to protect the interests of Georgia and the Georgian nation before the the governments and nations of the globe...

This was the final resolution of the freely elected Parliament of the free Georgian nation. Therefore, until the Georgian nation is free and has the real opportunity to freely elect its parliament, this resolution stays in force for every Georgian and citizen of Georgia."[45]

The suspension of the Constitution is also not mentioned in the memoirs of *Iona Todua* on the work of the Constituent Assembly in Batumi.[46]

When referring to the last sitting of the Constituent Assembly in Batumi, *Karlo Inasaridze* also says nothing about the suspension of the Constitution: 'On 16 March 1921, the Constituent Assembly of the Democratic Republic of Georgia held its last sitting in Batumi and assigned the government of Georgia chaired by *Noe Zhordania*

[43] *Eremov G. A.*, The Stages of Development of the Constitution of the Soviet Georgia (Stalin Tbilisi State University Publishing, Tbilisi), 1960, p. 110 (in Georgian).

[44] The memoirs of *A. Zakariadze* were given to *G. Sharadze* in 1990 and he later published this work fully – *Zakariadze A.*, Democratic Republic of Georgia (1917-1921), in: *Sharadze G.*, the History of Georgian Emigration Journalism, Volume IV, 2003, pp. 177-316 (in Georgian).

[45] *Zakariadze A.*, Democratic Republic of Georgia (1917-1921), in: *Sharadze G.*, the History of Georgian Emigration Journalism, Volume IV, 2003, p. 296 (in Georgian).

[46] *Todua I.*, 'The Notes of Escape', in: *Todua-Tsulukidze K.,* My Adventure and Some Memories, Soviet Past Research Laboratory, 2019, pp. 143-144 (in Georgian).

to leave the territory of Georgia and to continue its work in exile for the restoration of independence of Georgia.'[47]

The year 1921 turned out be transformative in the history of the Georgian constitutionalism. On 21 February 1921, the Constituent Assembly of Georgia accomplished its main mission and adopted the Constitution, even though the attack of the Soviet Russia and establishment of the regime of occupation did not allow Georgia to exist under the legal effect of this Constitution. After the Sovietization, Georgia was ruled by the puppet Revolutionary Committee, which dismantled the democratic institutions and the state sovereignty of Georgia. The Constitution of Soviet Georgia was adopted on 2 March 1922, following the sample of the 1918 Constitution of the Russian Federation. Its comparison with the Constitution of the Democratic Republic of Georgia reveals the false democratic and facade nature of the Soviet constitutionalism.

XI. THE CONSTITUTION OF GEORGIA OF 1921 AND THE GEORGIAN POLITICAL EMIGRATION

In the beginning of the Soviet occupation, the forces acting for the liberation of Georgia believed that after the deoccupation of Georgia the Constituent Assembly of Georgia and the government appointed by this Assembly would be back in power. This is evidenced by the Address to the Presidium of the Constituent Assembly adopted by the Conference of the Social Democratic Workers Party of Georgia that was held illegally in Georgia in February 1922:

'To the Presidium of the Constituent Assembly of Georgia: Nikoloz Chkheidze, Ekvtime Takaishvili and Simon Mdivani

The Social Democratic Conference of Georgia greets you, fully assured, that the violated rights of the Georgian Republic will soon be restored and it will again be governed by the supreme body expressing the free will of the people and its legitimate government. "[48]

This address is dated 7 February 1922. Approximately in one month, on 3 March 1922, the three political parties of Georgia (Social Democrats, Democratic Party and Socialist Federalist party) adopted the joint declaration, which underscored that these three parties 'enjoyed the support of 93% of the members of the Constituent Assembly, which protected the Georgian independence unanimously'. According to the demands of the declaration the Russian occupation army had to leave Georgia and the occupation had to be stopped, 'which will naturally be followed by the

[47] *Inasaridze K.*, The Short 'Golden Age', Democratic Republic of Georgia 1918-1921, Radio Documentation (Munich), 1984, p. 479 (in Georgian).

[48] The Report of the Illegal Conference of the Social Democratic Workers Party of Georgia, published in the magazine 'Free Georgia', Issue Nr. 22, 1922, p. 21 (in Georgian).

restoration of the legitimate regime established by the Constitution of the Republic'.[49]

With the passing of time, a new political reality was formed and some changes were already considered necessary in the organization of the Georgian State after the deoccupation. In this respect, the project of the new program of the Georgian Social Democratic Workers Party, prepared by *Noe Ramishvili* and published in 1925, should be mentioned. Some of its provisions were not consistent with the 1921 Constitution and implied that the Constitution had to be amended. For example, *Noe Ramishvli* considered the formation of new autonomous regions in Georgia feasible:

'The restoration of the autonomy granted to Abkhazia and Muslim Georgia by the Constitution of the Democtratic Republic, as well as Saingilo (Region of Zakatala), since it is decided by the treaties concluded with the neighbors and the judgement of arbiters, that it should be returned to Georgia. Autonomy should be granted to all the small nations as well, which are fully settled on a certain territory and will express their will thereto through the secret, universal, direct, equal and proportional elections.'[50]

It is interesting, how the political emigrants (namely, the Social Democratic Party) imagined the restoration of the constitutional order in Georgia. In 1941, when the Soviet Government was in difficult circumstances, it was not ruled out that the German Army would enter the Georgian territory. The Foreign Bureau of the Georgian Social Democratic Party developed an interesting document, which provided for the restoration of the independent statehood of Georgia. The German Army did not invade Georgia, and even if they had invaded it, the question, whether Nazi Germany would have allowed the steps for the restoration of Georgian independence is a wholly different issue.[51] What matters here, is the vision of the Georgian emigrants: if the German Army had entered Georgia, the local anti-Soviet political forces in Georgia would have had to form a temporary government. For the formation of the permanent government, it was necessary that the national government of Georgia returned from exile. To return to the path of a normal life, 'all the political Articles of the Constitution will be restored and the freedom of speech, press, assembly, faith, association, etc. will be declared'.[52] Though not expressly stated in this document, it can be assumed, that the restoration of the political rights would allow for the holding of the elections and the new legislative body would be entitled to amend the 1921 Constitution in a way, that would be considered necessary by the political forces coming to power after the elections.

[49] The Declaration of the Political Parties of Georgia, published in the magazine 'Free Georgia', Issue Nr. 20, dated 15 April 1922, p. 4 (in Georgian).

[50] *Ramishvili N.*, Project of the Program of the Georgian Social Democratic Workers Party (For Discussion), published in the magazine 'Fight', Issue Nr. 10-11, 1926, p. 36 (in Georgian).

[51] The Georgian emigrants were greatly influenced by the example of 1918, when Germany supported the Independence of Georgia at the time.

[52] Our attitude in the times of war - in the magazine 'Our Banner' (Notre Drapeau), Issue Nr. 1, 1949, pp. 33-34 (in Georgian).

Dimitry Gegenava[*]

THE FIRST CONSTITUTION OF GEORGIA: BETWEEN MYTHS AND REALITY

ABSTRACT

The Constitution plays an essential role in the history and political-legal life of any state, even if it only has a formal status. The First Constitution of Georgia had a special fate, it did not just become a legal document, but it also constituted a symbol of the country's independence and the historical-cultural development of the country.

The Constitution of 1921 is one of the most remarkable legal acts that was enshrouded in myths even in process of being accepted. As the years go by, the myths about it are only strengthening. The reason behind this is not only the distinctive structure, history, and content of the current Constitution, but also the unsustainable status of the current constitution and the numerous changes, which have led to skeptical, often even to contemptuous attitudes.

The paper discusses some exaggerated and some considerations already enveloped in myth, that are related to the First Constitution of Georgia, assesses their credibility and authenticity.

I. INTRODUCTION

In the history of every state, there are political and legal documents that carry special authority and recognition. Perhaps, their content is not as valuable as people imagine it, or it may no longer even have a legal force, yet, as a symbol, it is still eloquent and exercises such a power that even the Constitution would be envious. There are many examples of similar documents. The Declaration of Independence of the United States, which constitutes a declaration of the creation of a new state on the one hand and, a declaration of war on the other hand,[1] has never had legal force despite its status;[2] However, it is probably difficult to find a person who would diminish its importance, especially since it has been attested in the Supreme Court's case-law as an essential act[3] incorporating the basic principles, that make interpretations of the fundamental

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[1] *Gegenava D.* (ed.), Constitutionalism, General Introduction, Book I, 2018, p. 23 (in Georgian).

[2] *Sandefur T.,* The Conscience of the Constitution, The Declaration of Independenceand the Right to Liberty, Cato Institute, 2014, p. 15.

[3] *Sandefur T.,* The Conscience of the Constitution, The Declaration of Independence and the Right to Liberty, Cato Institute, 2014, p. 15.

principles of the state and law possible. Nevertheless, *Thomas Jefferson*, *Abraham Lincoln*, *James Wilson*, and numerous other political figures considered the Declaration of Independence to be a founding act of the country.[4] Similar in status, but different in terms of its legal force, is the First Constitution of the Weimar Republic[5] which had existed as a draft for almost 70 years before its adoption and it could not be passed by the Frankfurt National Assembly at first because of the emperor (Kaiser).[6] Symbolically, due to its special significance, its modified version was finally approved in 1919.[7]

Georgia is very proud of its history and the continuous cultural process that took place in the same territory – in a historic place. Unfortunately, from a legal point of view, the country's experience lags far behind other areas. Regardless of several distinctive statutes from the medieval times,[8] far more important for the contemporary Georgian legal culture and consciousness is the experience of the recent history and the historical statute that is even considered sacred. The First Constitution of Georgia combines several fundamental moments at once - it affirms the existence of the First Republic and Georgia's independence, it emphasizes the cultural and social level of Georgian politics at the time; It summarizes the Georgian legal thinking and technique of the previous century. Therefore, it is logical to have so much talk, discussions, excessive and unexaggerated critiques around it. It is noteworthy that, along with the real characteristics, some unreal and already mythical signs are attributed to the Constitution, and it is idealized.

The aim of the article is to review the First Constitution of Georgia as a basic law with its political and legal characteristics, also intends to highlight and analyze some common myths and rumors regarding the Constitution, and adjust them to reality as much as possible, because regardless of how remarkable the statute being dealt with, it is always desirable to have detailed and extensive information about it so that the deliberations of the later generations can be based on rationalism and critical thinking, instead of superpatriotic statements imbued with heroism.

II. THE FIRST CONSTITUTION - THE FIRST EXPERIENCE

The Constitution of 21 February 1921, was one of the first acts of constitutional significance in Georgia from a classical constitutionalism point of view. Obviously, over the course of several millennia, the country has had a number of state-regulating acts, however, it did not have a constitution, the main purpose of which is the limitation of

[4] *Anastaplo G.,* Reflections on Constitutional Law, 2006, p. 15.
[5] *Gegenava D.* (ed.), Constitutionalism, General Introduction, Book I, 2018, pp. 36-37 (in Georgian).
[6] *Melkadze O., Ramishvili N.,* German Constitutional Law, 1999, p. 7 (in Georgian).
[7] *Melkadze O., Ramishvili N.,* German Constitutional Law, 1999, p. 9 (in Georgian).
[8] *Gegenava D.* (ed.), Introduction to the Constitutional Law of Georgia, 2021, pp. 33-34 (in Georgian).

power.[9] In this respect, the first and most prominent statute is the Act of Independence of Georgia of May 26, 1918, which did not remain as a mere declaration and on March 12, 1919 it was adopted as a law by the newly elected Constituent Assembly at its very first session.[10] This event had more legal than symbolic significance, because in fact the seven-point act laid down the most important principles for the transition period, to some extent even served as a 'small constitution' throughout the existence of the Georgian Democratic Republic. Considering its content, the Act of Independence is even viewed as a preamble to the First Constitution,[11] however, this assessment is exaggerated, as the Constituent Assembly approved the text for the Constitution in absence of it and even adopted it.[12]

The adoption of the Constitution was of extreme importance for the Democratic Republic. The fact that among the three South Caucasian republics, only Georgia managed to adopt a basic law, added a special value to the aforementioned event. The Constitution itself became a natural symbol of Independence and freedom. Perhaps this explains the special attitude and emotional connection that the modern society has towards it. Most people do not ask questions about the legitimacy of the First Constitution, it is even observed as the basis for the Restoration of Independence and as a continuation of the legacy that existed in the First Republic. For this reason, the preamble of the current Georgian Constitution emphasizes the connection with its historical and hereditary legacy,[13] in this way, the problem of legitimacy that the current constitution had since its adoption, is somehow eliminated and it underlines the function of that unperformed social integration, the implementation of which was much awaited by a great number of political players in 1995.

The 1921 Constitution was a challenge for the Georgian law. As there had been no similar previous experience, it was logical that special attention was given to its creation and adoption. The first Constitutional Commission was established within the framework of the National Council,[14] which was later superseded by the Commission

[9] *Gegenava D.* (ed.), Introduction to the Constitutional Law of Georgia, 2021, pp. 33-34 (in Georgian).
[10] *Shvelidze D.* (ed.), 1028 Days of Independence, Daily Chronicle of the First Republic of Georgia (1918-1921), 2013, p. 132 (in Georgian).
[11] *Gegenava D., Kantaria B., Tsanava L., Tevzadze T., Macharadze Z., Javakhishvili P., Erkvania T., Papashvili T.,* Constitutional Law of Georgia, 4th edition, 2016, p. 34 (in Georgian).
[12] *Demetrashvili A.,* The Constitution of Georgia of February 21, 1921 from the 2011 Revision, in: 'At the Origins of Georgian Constitutionalism - 90th Anniversary of the Constitution of Georgia of 1921', 2011, p. 11 (in Georgian).
[13] Preamble of the current version of the Georgian Constitution, available at: <https://matsne.gov.ge/ka/document/view/30346?publication=36> (accessed 1.7.2021).
[14] *Matsaberidze M.,* Elaboration and Adoption of the Constitution of Georgia of 1921, in: 'At the Origins of Georgian Constitutionalism - 90th Anniversary of the Constitution of Georgia of 1921', 2011, p. 18 (in Georgian).

of the Constituent Assembly.[15] On behalf of the last composition of the Commission, it can be stated that the constitution's the process of drafting the Constitution was very interesting and intensive. The Draft Constitution included both the classical concepts, institutions, and principles, as well as the major innovations relevant to the world at that time. The basic law of the First Republic took the experiences of other states into consideration, however, most importantly, it did not attempt to blindly integrate any normative order .[16] In order the people to better understand the content of the Constitution and to not keep it as legal exclusive, *Pavle Sakvarelidze* the Chairman of the Constitutional Commission, was publishing commentaries on each chapter of the Constitution in the press under a pseudonym.[17] He and several other members of commission, as well as, the invited experts, showed rare enthusiasm and professional passion while trying to make the First Georgian Constitution a common national act. For this purpose, both the Commission and the Constituent Assembly spared no effort.

III. CONSTITUTIONAL PROVISIONS AND THE MYTHICAL VEILING

1. THE BEST CONSTITUTION

Romanticizing the past is a characteristic of many nations and people, often manifested in strange forms. In the presence of the current Constitution, which has a serious problem with the social integration function, special attention needs to be paid to the First Constitution of Georgia. The scholars of politics and constitutional law frequently cite and refer to it as the best Constitution although this myth is far behind the reality. Certainly, it is one of the most prominent texts of its time, especially given its geographical location, however, it had some weighty problems, which naturally prevented it from being qualified as the best Constitution.

The First Constitution had severe systematic problems: 1. It was strongly ideologized, it was basically reiterating the basic provisions of the Social Democratic Party's program. 2. The Constitution contained a considerable number of social rights, the implementation of most of them would question not just the sustainability and authority of the basic law, but it would also call the existence or non-existence of the state itself into question. 3. The basic law formed an unbalanced super-parliamentary republic without a proper and effective check and balance system. 4. The absence of the institution of the head of state and the partial distribution of his rights and responsibilities to some state structures would inevitably lead to constitutional and political crises and in a parliamentary

[15] *Shvelidze D.* (ed.), 1028 Days of Independence, Daily Chronicle of the First Republic of Georgia (1918-1921), 2013, p. 135 (in Georgian).

[16] *Kantaria B.,* Fundamental Principles of Constitutionalism and the Legal Nature of the Form of Government in the First Georgian Constitution, 2013 (in Georgian).

[17] *Gegenava D.,* European Foundations of Georgian Constitutionalism: The Struggle for the Rule of Law, in: 'European Values and Identity', 2014, p. 120 (in Georgian).

republic the responsibility of dealing with these rests exactly with the head of state. 5. While the novelties of that period were still undeveloped in Georgia, they were already taking roots in the European Constitutionalism (e.g. Constitutional Control)

Despite the problems, the 1921 Constitution had numerous positive aspects about which much has been written and spoken, therefore, these will not be presented in the article. Ultimately, all this speaks for a good basic law that had many problems, and was not best in any way, yet it was exceptional for its geographic area and culture.

2. HASTILY ADOPTED AND LATER SUSPENDED

One of the serious allegations made against the First Constitution relates to its hasty adoption, without an in-depth examination. For any act, especially the basic law of the country, perhaps be nothing can be as humiliating and offensive as a hasty adoption, this automatically implies that was enacted without exhaustive understanding, observation, and adequate consideration. In this matter the Constitution is indeed simple, the work process on it had started within the National Council and the first Constitutional Commission was established at that time,[18] the legal and historical successor of which became the Constitutional Commission of the Constituent Assembly. It is also noteworthy that the Constituent Assembly approved the Constitutional Commission as soon as its election on March 18, 1919.[19] As a result, it can be noted that the work on the Constitution lasted for at least three years. Regardless of being considered at different paces and compositions of the Commission, the process continued and the project of the Constitution was discussed in detail by chapters and even by articles.[20] Many key issues were reviewed and agreed upon in advance, the same applies to some key chapters for instance, even in 1920, it was already known that the head of the state would not be mentioned in the Constitution,[21] an agreement had been made around the model of church-state relations[22] and the corresponding regulatory norms,[23] as well as the immutability of the form of state governance[24] and etc.

[18] *Matsaberidze M.,* Elaboration and Adoption of the Constitution of Georgia of 1921, in: 'At the Origins of Georgian Constitutionalism - 90th Anniversary of the Constitution of Georgia of 1921', 2011, p. 18 (in Georgian).
[19] *Shvelidze D.* (ed.), 1028 Days of Independence, Daily Chronicle of the First Republic of Georgia (1918-1921), 2013, p. 135 in Georgian).
[20] *Matsaberidze M.,* Constitution of Georgia of 1921: Development and Adoption, 2008 (in Georgian).
[21] *Gvazava G.,* Basic Principles of Constitutional Law, 2nd edition, 2014, pp. 7-16 (in Georgian).
[22] *Matsaberidze M.,* Constitution of Georgia of 1921: Development and Adoption, 2008, p. 78 (in Georgian).
[23] *Gegenava D.,* Basic Legal Aspects of the Church-State Relations (1917-1921) and the First Constitution of Georgia, in: *Gegenava D., Javakhishvili P.* (eds.), Democratic Republic of Georgia and the Constitution of 1921, 2013, pp. 178-179 (in Georgian).
[24] *Kantaria B.,* Fundamental Principles of Constitutionalism and the Legal Nature of the Form of Government in the First Georgian Constitution, 2013 (in Georgian).

The work on the Constitution took longer than initially planned, and for this reason, the Constituent Assembly requested a corresponding report and concrete results.[25] Therefore, to the claim that the Constitution was adopted hastily is – absurd. The Constitution was adopted in an expedited procedure – this argument is both true and logical, the Constitution of an independent state was considered as one of the most serious mechanisms to fight against the approaching enemy and for the political elite the adoption of the Constitution was a matter of principle. Therefore, the Constituent Assembly was convened during the war, and it approved prepared draft of the Constitution.

Another important accusation levelled against the First Constitution was the suspension of the Constitution by the Constituent Assembly.[26] This is not confirmed by any historical or legal circumstance. The existence of this fact is the result of the imagination of the Soviet Security Services. They made every effort to justify their actions, to present occupation as a solution, but they failed. The legitimate government of the Democratic Republic left Georgia and as a matter of principle, they did not sign the Act of Surrender for the Bolshevik invaders.[27] The Government continued to fight for the Independence of Georgia, regardless of being in emigration. With this in mind, why would the Constituent Assembly suspend the validity of the Constitution, even if it had formal authority to do so. Moreover, it should be noted that the Basic Law did not allow for the idea of its suspension at all.[28]

3. AN ACT WITH NO PRACTICAL EFFECT

On February 21, 1921, the Constitution of the Democratic Republic was adopted, and the Fall of Tbilisi took place on February 25th. As a result, the Constitution is often being referred to as an inactive document, which was valid only for four days.[29] The existence of this myth is also attributed to the Soviet Special Services, since the proposal implies the assumption that the Fall of Tbilisi led to the termination of political processes in Georgia, which is certainly not true. The Government of the Democratic Republic of

[25] *Gegenava D.* (ed.), Introduction to the Constitutional Law of Georgia, 2nd edition, 2021, p. 39 (in Georgian).

[26] *Shengelia R.* (ed.), Fundamentals of Georgian Law, 2004, p. 71; Tsnobiladze P., Constitutional Law of Georgia, Volume I, 2005, p. 100 (in Georgian).

[27] *Shvelidze D.* (ed.), 1028 Days of Independence, Daily Chronicle of the First Republic of Georgia (1918-1921), 2013, p. 433 (in Georgian).

[28] 1921 Constitution of Georgia, available at: <https://matsne.gov.ge/document/view/4801430?publication=0> (accessed 15.7.2021); *Gegenava D.* (ed.), Introduction to the Constitutional Law of Georgia, 2nd edition, 2021, p. 50 (in Georgian).

[29] *Demetrashvili A.,* The Constitution of Georgia of February 21, 1921 from the 2011 Revision, in: 'At the Origins of Georgian Constitutionalism - 90th Anniversary of the Constitution of Georgia of 1921', 2011 (in Georgian).

Georgia stayed in Batumi until mid-March and was defending itself from there, leading the political processes. This is also indicated by the fact that the Constitution was published in Batumi after the Fall of Tbilisi.[30] The fact of the subsequent publication of the Constitution and the presence of the Government in Batumi confirms that the myth concerning the validity of the constitution for only four days is unsubstantiated. The Constitution was in legal force at least until the moment, when the Government of the Democratic Republic of Georgia left Georgia, and was *de jure* in effect for the entire period of the Soviet occupation and the restoration of state Independence, until the adoption of the new Constitution, that finally lead to the ending of the tragic, yet interesting adventure of the First Constitution.

4. A STRONG PARLIAMENTARY REPUBLIC

The Democratic Republic of Georgia was a clearly expressed parliamentary republic with its parliamentary supremacy and a power vector deviated towards the Parliament. The Parliament, as the highest representative body of the state, was the power concertation center. Due to the fear of transferring and allocating the power to the head of the state, the institution of the president was rejected.[31] The electability of the Chairman of the Government for a one-year term, the issue of ministerial responsibility, as well as the relationship between the Parliament and the government suggest that the First Constitution was establishing not just a parliamentary republic, but a super-parliamentary republic with a completely unbalanced system of separation of power, that would make the realization of the principles of accountability and responsibility of the Government impossible in practice. Hence, in this regard, the provisions of the Constitution are not characterized with exemplary norms and seriously lack the mechanism of checks and balances, in absence of which, it is irrelevant to speak about the strength and stability of a parliamentary republic.

IV. WHAT WOULD HAPPEN IF…?

When talking about the First Republic of Georgia and the Constitution, perhaps the most common combination of words is – 'what would happen if…?' Indeed, what would happen if the Post-Soviet Union had not invaded Georgia, Georgia had continued living independently, and the Constitution had fulfilled its purpose. After all, one thing is certain, in any case, the Constitution would have needed amendments and that is

[30] *Sioridze M.,* Place, time and circumstances of the publication of the First Constitution of Georgia in: 'At the Origins of Georgian Constitutionalism - 90th Anniversary of the 1921 Constitution of Georgia', 2011, pp. 42-50 (in Georgian).
[31] *Gvazava G.,* Basic Principles of Constitutional Law, 2nd edition, 2014, pp. 7-16 (in Georgian).

natural. The founders did not deny this and even noted that the Constitution could never be permanent, its content should be renovated, revised by upcoming generations, as needed.[32]

It would have been very difficult for the Constitution to implement in practice, especially in regard to the rights, since the scope and content of these rights would have turned out to be a heavy burden for a young, emerging state. As a result, the political elite would have been forced to improve the part of the rights, consolidate the provisions, and renounce some of them.

The amendments would have been required with regard to the norms on state power. In practice, unbalanced government relations would have created problems, especially in a multi-party Parliament. Some neglected functions of the head of the state would have been relevant, or it would have been established as an institution in the future, or the Chairman or other organs of the Government would have been strengthened functionally.

Numerous things could have happened in the circumstances of independence, various interesting and important amendments would have taken place in the Constitution part of which would have succeeded, some probably not, yet it would be an independent state's decision made in accordance with its political agenda and directed towards the political relations and the proper functioning of the state.

V. CONCLUSION

The First Constitution of Georgia is destined for popularity and constant relevance, just like the current or the future Constitutions of Georgia are ordained to be compared with the First Constitution. The history of the drafting and the adoption of the 1921 Constitution, its special legitimacy coupled with its role in a twisted historical storm, will always ensure its presence as a distinctive Act. It is true that the First Constitution was not ideal and complete, neither is it possible to properly assess its practical relevance, but it can be certainly concluded that for the Georgian reality it was a special legal act, that still has a sacred nature until now. There are many myths about it, and they will remain in the future too (some will diminish, some will glorify), but the truth is that it is, in any case, a self-sufficing Constitution with its own shortcomings, party sympathies and stereotypes that were typical for that period. Meanwhile, it is impossible not to mention its democratic character, the attempt to create innovation in multiple directions and, the courage, with the help of which the Constitution of a young state was seeking to establish a legal order based on European values in the state.

[32] *Matsaberidze M.,* Constitution of Georgia of 1921: Development and Adoption, 2008 (in Georgian).

Vakhtang Menabde[*]

THE IDEA OF DIRECT DEMOCRACY IN THE CONSTITUTION OF THE FIRST REPUBLIC OF GEORGIA

ABSTRACT

One century has passed since the adoption of the Constitution of Georgia of 21 February 1921. Until now the 1921 Constitution remains as a document, which simply plays the role of the mythological foundation of legitimation, leading to the thwarting of its perception as a living document. Since the restoration of independence, every attempt of its analysis is marked by this factor. The undertaken analytical work is limited by the modern perspective and the theoretical framework of liberalism. The supreme law of the First Republic does not succumb easily to these methodological tools, which makes it impossible to study the importance and the basis of the document, as well as its relation to the epoch of that time thoroughly. The present article aims to eradicate this flaw.

The debates held on the constitutional issues at that time, as well as the final documents reveal clearly that the founders made the choice in favor of the direct democracy. This model is based on the unity of citizens and the state (and is thus opposed to the liberal theory, which conceptualizes the two as antagonistic elements) and aspires to implement this model through the application of specific mechanisms. In this system, a voter plays an important role in everyday politics and its role is not circumscribed to voting in periodic elections, whereas the electoral and institutional systems themselves are organized in a way to maximally simplify it for the public to wield influence on political processes. The most interesting part is the fact that the Georgian Mensheviks did not simply chose a theoretical model and mechanically transplanted it in Georgia, but they adjusted it to the existing context, provided critical analysis and developed it further.

Thus, the present essay analyzes the Constitution of 21 February 1921 through the theoretical framework of direct democracy. And for this purpose, it will employ the methods of logical analysis, historical and comparative research and will be based on the scholarship, historical sources, normative and archive materials. In this respect, the present article aims to make the long, polyphonic and dynamic process of the drafting

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of the Constitution understandable for the reader; to show the context and the paths leading to specific decisions, some of which are simple, straightforward and clear, and some are winding, untraveled and one might even say, dangerous.

I. INTRODUCTION

One century has passed since the adoption of the Constitution of Georgia of 21 February 1921. From today's vantage point, where the patriotic romantism, that has been blurring the perception of the First Republic for decades is slowly disappearing and the fog fed by the totalitarian reaction, thwarting the objective analysis of this event, is dispersing, the researcher is put in a favorable position to understand the logic of the political order established by the supreme law of that time.

The foremost error made in discussions about the first Constitution is related to the terms of its legal effect. It is assumed, that the comprehensive analysis of this document is hindered by the shortness of the time between its adoption and its factual suspension. This attitude misses one important factor: throughout the three-year period from the gaining of independence until 21 February 1921, i.e. the time when the Constitution was formally approved, the political order had started to form step-by-step, which was essentially constitutionalized by the Constituent Assembly four days prior to the Occupation.

This document had a strange fate. At different times, different governments had brought it into force three times, however, it has never had actual legal effect in practice. At first, it entered into force on 21 February 1921, but soon afterwards the sovietization destroyed the ideals enshrined in the document. After seven decades, on 9 April 1991, the Supreme Council of the Republic of Georgia adopted the Act of Restoration of Independence of the Georgian State, which declared that the 1921 Constitution was still legally valid at the time, however, in reality the 1978 Soviet Constitution continued to be in force (with certain amendments). Later on, after a *coup d'état*, the Military Council of the Georgian Republic issued a declaration on 21 February 1992, which declared the restoration of the first Constitution, however, it did no entail any actual legal consequences. Although this was the last attempt of bringing the first Georgian Constitution into force, its struggle for self-establishment in the Georgian legal realm has not stopped.

On 25 March 1993, the State Constitutional Commission was formed and it was assigned with the task to develop the revised version the 1921 Constitution of the First Republic.[1] However, at the end the Commission and then the Parliament created a

[1] *Demetrashvili A., Kobakhidze I.,* Constitutional Law, 2010, p. 59 (in Georgian).

totally different document (The Georgian Constitution of 24 August 1995), which only stated in its preamble, that it was based on the 'basic principles of the 1921 Constitution of Georgia'. In spite of the fact, that the 1995 Constitution has formally borrowed quite a lot from its predecessor (from structural or normative perspective), their underlying logics differed substantially in view of the form of government, as well as the political role assigned to the citizens and the social-economic system. In 2010, another reform of the Constitution of Georgia was carried out. On 15 December, the legislature adopted amendments to the supreme law, which distanced this document even further from the spirit of the First Republic. The preamble was also modified. From that moment, the supreme law was based not on 'principles' anymore, but on 'historical-legal legacy of the 1921 Constitution'. Moreover, a whole range of steps were taken, which contradicted the values of the first Constitution – on one hand, these steps obstructed the establishment of social justice; on the other hand, they diminished the power of people. The last attack on the century-old achievement was made by the constitutional reform of 2016-2018. It reduced the safeguards and values surviving from the earlier document even further.

In the context of such reduction, the first Constitution remains as a document, which only plays the role of the mythological foundation of legitimation, leading to the thwarting of its perception as a living document. Since the restoration of independence, all the attempts at its analysis are marked by this fact. These studies fail to revitalize the document in the context, in which it originated. Hence, the their work is limited by the contemporary perspective and the liberal theoretical framework. The problem with this approach is the fact that these methodological tools are not easily applicable to the supreme law of the First Republic, which makes it impossible to study the importance of this document, its basis and relation to the epoch of that time thoroughly. The present article aims to address this flaw.

It is clear from the discussions on the constitutional issues of that time (sittings of the Constitutional Commission, debates in the Constituent Assembly, articles, translations, presentations), as well as from the final document, that the founders made a decision in favor of direct democracy. This model is based on the unity of citizens and the state (in contrast to the liberal theory, which considers the two as adversarial elements) and tries to implement this vision through the special mechanisms. Here, the voters play an important role in everyday politics and their role is not limited to voting in the periodic elections. Meanwhile, the electoral and institutional systems are arranged in the manner, that maximally simplifies it for the public to wield influence on the political processes. The most interesting part is that Georgian Mensheviks did not simply take the theoretical model and tried to mechanically transplant it in practice, instead, they tried to fit the model to the present context, they also critically reviewed and developed it further.

The choice of the Georgian Social Democrats was mostly determined by their quarter-century long work experience. In this respect, the experience of a short-lived self-government in Guria and other territories of Georgia in the first years of the 20th century, as well as the party system based on local initiatives and the ideological tenets of the party, which were always tilted towards self-government, are noteworthy.

Thus, the present essay studies the Constitution of 21 February 1921 through the theoretical framework of direct democracy. For this purpose, it applies logical analysis, historical and comparative research methods and is based on the academic research, historical sources, normative and archive materials. In this respect, this article aspires to familiarize the reader with the long, polyphonic and dynamic process of the drafting of the Constitution, in order to show them the context and the paths leading to specific decisions, some of which are simple, straightforward and clear, and some of which – winding, untraveled and one might even say, dangerous. The present text aspires to be a guide in the labyrinth, the heart of which holds the lock to the first Constitution of Georgia, unlocking of which takes three keys. The first one covers the ideas: the framers of the supreme law applied *Marxism* as a theoretical foundation. At the same time, they referred to the works of the researchers of the political science at that time, especially the works of *Julius Hatschek*. The second key is comparativism: in this regard, the Georgian Social Democrats' interest towards the Swiss experience was unparalleled by any other legal system. The Georgian leftists chose the Swiss system as a model. The third key is the theoretical visions of the authors of the Constitution, whereby particular attention should be paid to *Rajden Arsenidze*, who was the Chairperson of the Constitutional Commission at first and the Minister of Justice later on. He prepared the drafts of the most complex chapters of the Constitution, dedicated to the Parliament and the Government and even prepared a commentary on them. He was the first one to develop the idea of integrating political liability mechanism of the government, as a characteristic institution of the parliamentary republic, into the model of direct democracy. In view of the theoretical framework applied at that time, this was a breakthrough, which opened completely new prospects for this government form. The process of putting this vision on the right path and its adequate incorporation within the unified structure of the Constitution should be credited to *Noe Zhordania* – his speech of 4 December 1920 completely changed the logic of the draft presented to the Constituent Assembly (which was tilted towards the liberal conception of parliamentarism) and returned it within the framework of direct democracy. Naturally, there were other more or less important contributors as well, that will be discussed in further detail in the article below.

As the present study has a primary goal to provide an authentic interpretation of the political system of the First Republic of Georgia, it is indispensable to review the foundations in the first place, i.e. what the Constitution of 21 February 1921 was built on.

II. THE MARXIST TAXONOMY OF THE REPUBLICAN FORMS OF GOVERNMENT

Karl Marx considered that the republican form of government allowed to serve the bourgeoisie, as well as the social goals. It needs to be ascertained, which type of agencies ensure state functioning. *Karl Marx* offers to base the classification of the republican states according to their goals, whether these goals are bourgeois or social.[2] In the ,,Eighteenth Brumaire of Louis Bonaparte', *Karl Marx* further elaborates on this taxonomy and identifies three forms of republican government: social, democratic and parliamentary.[3] First of these is proletarian, the second – *petite bourgeois*, while the third is bourgeois[4] (this opinion is shared by the Georgian Social Democrats as well;[5] *Rajden Arsenidze* made a minor modification to this theory, as he differentiated among three forms of republics – aristocratic, bourgeois–liberal and democratic[6]). As an example of the latter, he demonstrates the example of a constitutional, i.e. parliamentary republic, that has enabled the domination of the bourgeoisie.[7] Democratic republic, where proletariat and *petite bourgeoisie* have a coalition, constitutes a compromise variant, which deprives the social demands of the proletariat of its revolutionary sharpness in exchange for the democratic direction. Meanwhile, the democratic demands of the *petite bourgeoisie* are not limited to the political form and include social issues as well.[8] The suggestion of *Karl Kautsky*, that the 'proletariat needs democracy'[9] is also fed from the above-mentioned *Marxist* thesis. The Georgian Social Democrats chose this form of government. *Pavle Sakvarelidze* considered the democratic republic (in this case it is same as direct democracy) to be an appropriate form to fill in the substance of the socialist society,[10] as the democratic republic presented the best expression of the principle of 'self-government and domination of the people'.[11] The

[2] *Marx K.,* The Class Struggle in France, 1848-1850, in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, pp. 161-162.

[3] *Marx K.,* The Eighteenth Brumaire of Louis Bonaparte, in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 365.

[4] *Marx K.,* The Eighteenth Brumaire of Louis Bonaparte, in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 365.

[5] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 72 (in Georgian).

[6] *Arsenidze R.,* Democratic Republic, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 44 (in Georgian).

[7] *Marx K.,* The Eighteenth Brumaire of Louis Bonaparte, in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 299.

[8] *Marx K.,* The Eighteenth Brumaire of Louis Bonaparte, in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, pp. 300-301.

[9] *Kautsky K.,* Georgia. Social-Democratic Republic of Peasants. Impressions and Observations, 2018, p. 95.

[10] *Sakvarelidze P.,* For the Constituon of Georgia, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 327 (in Georgian).

[11] The Constituent Assembly (the 26th Sitting of November), Discussion of the Draft Constitution of

Socialist Revolutionary, *Ivane Cherkezishvili* also supported the democratic republic and criticized the parliamentary form of government.[12] In his speech of August 1918, *Noe Zhordania* devoted extensive explation to this choice of the Georgian Socialists. Referring to *Karl Kautsky,* he gave reasons to demonstrate the advantages of the strategy of a gradual transition to the 'social ground of the society'.[13] *Rajden Arsenidze* aimed to pursue the same goal: he aspired to prepare the ground for the future socialist order.[14] *Akaki Chkhenkeli* was driven by the same aspiration.[15]

Noe Zhordania believed, that the 'state has no inherent goals, the state goals are provided by the classes, which dominate it' and that 'the state works in the interests of the classes, which are controlling it'.[16] However, it may happen occasionally, that the 'controllers of the state' and the organization of the state are not aligned. This leads to a conflict between state goals and opportunities for their fulfillment.[17] It is necessary to avoid such a conflict,[18] the only way for which is to act within the limits of historical opportunity.[19] This entails the following perspective: to build a state, 'which will do as much as possible in the interests of those who possess little or no property'.[20] The first step of this strategy was to establish the democratic form of government, without

Georgia, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, 2018, pp. 580-581 (in Georgian).

[12] Meeting of the Constitutional Commission, 11 June 1918, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 28 (in Georgian).

[13] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 60 (in Georgian).

[14] Discussion of the Constitution in the Constituent Assembly, Sitting of 17 December, Speech of *R. Arsenidze,* The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 632 (in Georgian).

[15] Discussion of the Constitution in the Constituent Assembly, Sitting of 17 December, Speech of *A. Chkhenkeli,* The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 672-673 (in Georgian).

[16] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 61 (in Georgian).

[17] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 61 (in Georgian).

[18] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 62 (in Georgian).

[19] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E.,* Kenchoshvili T. (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 61 (in Georgian).

[20] Zhordania N., Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 62 (in Georgian).

which reaching the 'kingdom of socialism' would not be possible.[21] In the words of *Karl Kautsky*, one can synthesize democratic republic with socialism.[22] Naturally, the end goal was to create a socialist republic.[23]

Referring to *Karl Marx*, *Noe Zhordania* criticized the parliamentary republic, which is characterized by the consolidation of power (legislative, executive and judicial) in the hands of the parliament or the bourgeoisie.[24] *Pavle Sakvarelidze* also shared this opinion.[25] *Noe Zhordania* believed, that under the parliamentary system, as power is delegated from the people to the parliament, popular sovereignty is transformed into the sovereignty of the dominant class.[26] Such a concentration of power rules out the involvement of masses of the public in the government of the state. People are deprived of the opportunity to self-govern and this opportunity is transferred to the bourgeoisie. In contrast to this, in the democratic republic, through the multifarious elections on one hand and through the application of the tools of direct democracy on the other, people are involved in the government; people also control the institutions, which fall outside the jurisdiction of the parliamentary majority.[27] Through the application of these three mechanisms, people manage to have the final say in the political processes. Thus, for *Noe Zhordania* the democratic republic differed from the parliamentary republic by the fact that the legislative body is not the only one holding political power, instead, it shares the instruments of political administration with the people.[28] This

[21] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, pp. 60-61 (in Georgian).

[22] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 72 (in Georgian).

[23] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 79 (in Georgian).

[24] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, pp. 72-73 (in Georgian). He repeated the theses stated here, word by word at the 1 December sitting of the Constituent Assembly, which he addressed about the Constitution on behalf of the Social-Democratic Party and the Faction. See the Speech of the Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 602-605 (in Georgian).

[25] *Sakvarelidze P.,* For the Constitution of Georgia, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 114 (in Georgian).

[26] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 80 (in Georgian).

[27] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 75 (in Georgian).

[28] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia*

reduces the influence of the bourgeoisie in the governing process.[29] The opinion of the Socialist Federalist *Samson Dadiani* concurred with the vision of *Noe Zhordania*, as he distinguished parliamentarism and democratism and considered the latter form as the outcome of popular or ,,non-intermediary democracy'.[30] In this step-by-step manner, the Georgian Socialists logically developed the concept of non-intermediary democracy, as the leftist solution to the problem of the form of government.

III. THREE MODELS OF THE FORM OF GOVERNMENT

Prior to the definition of non-intermediary democracy, the theory existing at the beginning of 20th century should be reviewed, which underlays the discussions about the forms of government at that time in Georgia.

In 1919, the translation of one part of the book 'Right of Modern Democracy' of the German professor, *Julius Hatschek* was published as a series of letters in the newspaper 'Republic of Georgia'.[31] This book was greatly influenced the framers of the Constitution. *Julius Hatschek* was directly quoted by the Chairperson of the Constitutional Commission and one of the framers of the Constitution, *Pavle Sakvarelidze*.[32] His influence is tangible elsewhere as well. Therefore, studying the opinions of *Julius Hatschek* is the crucial task of the present article.

The above-mentioned taxonomy, the general account of the republican forms of government is provided through the analysis of the specific legal institutions by *Julius Hatschek*. Based on the rich comparativist materials, *Julius Hatschek* distinguished between three types of a republic: 1. The Swiss, non-intermediary (direct) democracy; 2. The French parliamentary democracy; 3. The American democracy with the separation of powers.[33] Based on specific criteria, *Julius Hatschek* provided a road-map, via which a reader could understand the essence and the belonging of a specific political system.

The idea of non-intermediary democracy has its roots in the theory of the social contract of *Jean-Jacques Rousseau*. It should be underscored from the very beginning, that he

E., Kenchoshvili T. (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 75 (in Georgian).

[29] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August, 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 76 (in Georgian).

[30] *Dadiani S.,* Our Constitution – Viewed in the Light of the Right to People's State, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 263 (in Georgian).

[31] *Hatschek J.,* Right to Modern Democracy, 2016, p. 4.

[32] *Sakvarelidze P.,* For the Constitution of Georgia, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 309 (in Georgian).

[33] *Hatschek J.,* Right to Modern Democracy, 2016, p. 16.

accepted representation as a way of decision-making in addition to the mechanisms of direct involvement of the people. Furthermore, 'We already see in *Jean-Jacques Rousseau's* work that legislature is the body of the general will and is almost equal to the sovereign'.[34] However, in order to balance out the power of representatives, the referendum[35] and the right to popular initiative[36] are also established.

In non-intermediary democracy the proportional electoral system dominates. In this state, if citizens themselves are not able to directly participate in the government of a political unity, they should at least be involved indirectly by using their voting rights.[37] *Julius Hatschek* believes, that the 'majoritarian representation involves only part of the society in the work of legislature, only the proportional representation transforms the legislature into a scale-down community'.[38] This is ensured by the proportional representation principle, under which each group of the society is represented 'in place of its numerical power'.[39]

Jean-Jacques Rousseau's conception looks like the separation of powers, however, there is a difference, as for him it is the outcome of subordination: the executive branch is subordinated to the omnipotent legislative power (which expresses the 'general will' – *volonté générale*).[40] Here, trust towards the legislative branch and distrust towards executive branch prevails.[41] There is the unicameral legislative branch[42] that 'adopts laws, and protects them, i.e. it supervises the executive branch'.[43] The executive power belongs to the collegium *(pouvoir directorial).*[44] However, 'purely administrative decisions are made by individual members of the collegium and they are formally approved by the collegium'.[45] It is the 'servant agency' of the parliament.[46] There is no political liability of government, as it only 'discloses decisions'[47] of the representative body and has no political actorship

Under this system, the judges are appointed by the legislative branch.[48]

[34] *Hatschek J.*, Right to Modern Democracy, 2016, p. 51.
[35] *Hatschek J.*, Right to Modern Democracy, 2016, p. 29.
[36] *Hatschek J.*, Right to Modern Democracy, 2016, p. 69.
[37] *Hatschek J.*, Right to Modern Democracy, 2016, p. 137.
[38] *Hatschek J.*, Right to Modern Democracy, 2016, p. 137.
[39] *Hatschek J.*, Right to Modern Democracy, 2016, p. 137.
[40] *Hatschek J.*, Right to Modern Democracy, 2016, p. 20.
[41] *Hatschek J.*, Right to Modern Democracy, 2016, p. 49.
[42] *Hatschek J.*, Right to Modern Democracy, 2016, p. 29.
[43] *Hatschek J.*, Right to Modern Democracy, 2016, p. 27.
[44] *Hatschek J.*, Right to Modern Democracy, 2016, p. 28.
[45] *Hatschek J.*, Right to Modern Democracy, 2016, p. 85.
[46] *Hatschek J.*, Right to Modern Democracy, 2016, p. 51.
[47] *Hatschek J.*, Right to Modern Democracy, 2016, p. 89.
[48] *Hatschek J.*, Right to Modern Democracy, 2016, p. 100.

The concept of parliamentary democracy was developed by *Lucien-Anatole Prevost-Paradol* in 1869.[49] It is based not on the separation of powers, but on the mixing of powers instead.[50] The head of the state, the president is elected by the representative body.[51] The head of the state can dissolve the parliament (this institution is consistent with referendum and balances out the legislative power).[52] The legislative branch (its majority[53]) has the power to approve and dismiss the government.[54] However, the ministers are also accountable to the president.[55]

The judiciary is formed by the executive branch.[56]

Democracy with the separation of powers is based on the teachings of *Charles-Louis Montesquieu.*[57] Under this model, the legislative branch is the most inclined towards the usurpation of power.[58] The president is elected directly[59] and leads the executive branch single-handedly[60] (however, there are some honorable administrative issues that require the senate's approval[61]). They appoint and dismiss ministers,[62] who are their proxies[63] and are not subject to the confidence vote or the no-confidence vote.[64] The first person in the state has no power to dissolve the legislative body, however, they enjoy the veto power.[65] This is why the referendums are not allowed in this system.[66] Constitutional review is also available here as a functional alternative of the referendum and the dissolution of the legislative body.[67]

The judges are elected by the people.[68]

The modern liberal constitutionalism merged the first model with the second and the third models. Such an assimilation led to its practical disappearance.

There are three differences between the liberal and no-intermediary democracy.

[49] *Hatschek J.*, Right to Modern Democracy, 2016, p. 20.
[50] *Hatschek J.*, Right to Modern Democracy, 2016, p. 22.
[51] *Hatschek J.*, Right to Modern Democracy, 2016, p. 80.
[52] *Hatschek J.*, Right to Modern Democracy, 2016, p. 26.
[53] *Hatschek J.*, Right to Modern Democracy, 2016, p. 84.
[54] *Hatschek J.*, Right to Modern Democracy, 2016, p. 25.
[55] *Hatschek J.*, Right to Modern Democracy, 2016, p. 88.
[56] *Hatschek J.*, Right to Modern Democracy, 2016, p. 100.
[57] *Hatschek J.*, Right to Modern Democracy, 2016, p. 17.
[58] *Hatschek J.*, Right to Modern Democracy, 2016, p. 18.
[59] *Hatschek J.*, Right to Modern Democracy, 2016, p. 80.
[60] *Hatschek J.*, Right to Modern Democracy, 2016, p. 78.
[61] *Hatschek J.*, Right to Modern Democracy, 2016, p. 79.
[62] *Hatschek J.*, Right to Modern Democracy, 2016, p. 87.
[63] *Hatschek J.*, Right to Modern Democracy, 2016, p. 25.
[64] *Hatschek J.*, Right to Modern Democracy, 2016, p. 26.
[65] *Hatschek J.*, Right to Modern Democracy, 2016, p. 26.
[66] *Hatschek J.*, Right to Modern Democracy, 2016, p. 71.
[67] *Hatschek J.*, Right to Modern Democracy, 2016, p. 74.
[68] *Hatschek J.*, Right to Modern Democracy, 2016, p. 100.

The first and crucial thesis of the non-intermediary democracy is the unity of the people and the government, which was essentially excluded by the liberal theory, which positions an individual and the state as antagonistic actors.

The second one is the 'division of power'. In the non-intermediary democracy the executive branch is subordinated to the legislature and there is no horizontal relationship (coordination) between them, which is the case in *Charles-Louis Montesquieu's* conception or as it is arranged in the 'mixed' model of *Lucien-Anatole Prevost-Paradol* (no separation of powers applies here, which leads to the risk of the power usurpation by the parliament.)

According to the third thesis, people have the final say, while under the other systems, this power belongs to the representatives of the people.

The third thesis was reviewed extensively in the previous chapter. This is only the first and the second postulates will be reviewed below.

IV. THE STATE AND THE PEOPLE

The typical error made by a researcher, who thinks within the box of a modern state, is to conceptualize the state and the individual as two opposing concepts. It seems that the hostility between these two is inevitable. However, this opposition is not so old; it only goes back to the past few centuries and was brought up in arguments first by *Jean-Jacques Rousseau* and later by *Karl Marx*.

The Swiss diplomat, *Paul Widmer* distinguishes the attitude of the Swiss people towards the community from their attitude towards the state. 'They perceive themselves as the legislators and the government in a specific community',[69] but in case of the state 'it is assumed, that one should always be alert with it'.[70] Whenever discussions about the split of the citizen and the state and the hostility between the two take place in a modern state, the Swiss example should always be paid attention to. It keeps the moment, from which the ancient idea of the unity of the state and the citizen starts to dissolve - the point, which was sought by *Jean-Jacques Rousseau* all his life, when he was trying to imagine the social organization, which would not need a state, and the union of citizens, where the government and the citizen would not be estranged from each other.[71]

The socialist theory of the forms of government is concerned with this problem and keeps the parliamentary systems liable for it. As the latter empowers bourgeoisie, both

[69] *Widmer P.,* Switzerland as a Special Case, 2012, p. 156.
[70] *Widmer P.,* Switzerland as a Special Case, 2012, p. 156.
[71] *Widmer P.,* Switzerland as a Special Case, 2012, p. 156.

politically and financially,[72] it logically leads to the estrangement of the people and the government and the application of state power against the people.[73] *Noe Zhordania* referred to *Karl Marx*, when stating, that 'under such conditions the public interest is detached from the society and opposes it, as the higher general interest'.[74] The solution is in the democratic republican[75] form of government, since the power essentially stays with the people here. The people maintain important levers in the instruments for decision-making. At the sitting of the Constitutional Commission, *Akaki Chkhenkeli* discussed mixing the tools of non-intermediary democracy with the representation principle. He stated, that although it turned out to be impossible to reach the original goal of the 'execution of absolute power' [sic] by the people, a mixed model was still agreed upon: the mixed model should be understood as a mix of direct democracy and representative democracy, which results in non-intermediary democracy[76]).[77] At the same sitting, the Social Democrat, *Mukhran Khocholava* termed this choice as 'a synthesized system of the government'.[78] Here, the executive branch does not manage to consolidate the governing intruments, thus, it is forced to become a popular government.[79] This leads to the unity of the parliament and the people, the sovereign rule of the people, so that 'it is hard to draw a demarcation line between them. The people and the government – this is one unit, with common will and unified action'.[80] *Akaki Chkhenkeli* thought

[72] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 73 (in Georgian).

[73] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 73 (in Georgian).

[74] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 73 (in Georgian).

[75] 'Democratic republic' and 'non-intermediary democracy' as forms of government are used synonymously in the discussions in the First Republic. They are used as synonyms in the present work, as well.

[76] In the present work, the term 'direct democracy' and its mechanisms is used to describe the people, who govern themselves without representatives, whereas 'non-intermediary (direct) democracy' is a form of government, where system is built in a way not to lose the natural link between the representative and the represented.

[77] Journal of the Sitting of the Constitutional Commission of the Constituent Assembly, 20 November 1920, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 574 (in Georgian).

[78] Journal of the Sitting of the Constitutional Commission of the Constituent Assembly, 20 November 1920, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 575 (in Georgian).

[79] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 80 (in Georgian).

[80] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 76 (in Georgian).

that the crucial feature of the model, established by the 1921 Constitution, did not just constitute a transformation of the state into an economic organization, but it also lead to the full democratization of the government, i.e. the reinforcement of popular sovereignty in every sphere, the involvement of the people in the governing process and, thus, its merger with the official bodies.[81] This is why *Pavle Sakvarelidze* stated at the presentation of the Draft Constitution to the Constituent Assembly: 'The foundation of today's Georgia is the rule of the people, the self-possession of the people.'[82]

This essentially reminds us of *what Paul Widmer* stated with regards to the alliance contract of the Swiss confederates, that in contrast to any other two-part social contract (on one hand the agreement on the membership of a political union, on the other hand the agreement on domination), the execution of this agreement is not assigned to the dominant unit, but is rather declared as a common task.[83] According to the constitutional logic of the First Republic, it was the people who executed the power. Individuals were entitled to a whole range of mechanisms, which reduced the liberal paradigm of the separation of the citizen and the state to the maximum extent. The state agencies were maximally bound with liability and accountability to their constituencies and the public opinion had to transpire in the political processes. Finally, the laws adopted in line with the public opinion would be enforced by the people. This is how the non-intermediary democracy contradicted with what *Paul Widmer* termed as the 'creeping process of the loss of the state'.[84] The direct democracy, in contrast to the parliamentary democracy, is more strongly focused on the public.[85]

Rajden Arsenidze stated, that the existing system was not direct democracy. However, does this obstruct its identification as non-intermediary democracy? The answer can be found through the answer to another question, namely, to whom belongs the sovereignty? There is not much choice here, as at the end of the day 'sovereignty is vested either in the people or the governing elite'.[86] *Rajden Arsenidze* responded to this question with arguments and asserted that the tools of exercising of the supremacy of the nation (people) are more democratic in Georgian model, than elsewhere.[87] In

[81] Discussion of the Constitution in the Constituent Assembly, Sitting of 19 December, Speech of *A. Chkhenkeli,* The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 672-673 (in Georgian).

[82] Journal of the Sitting of the Constitutional Commission of the Constituent Assembly, 20 November 1920, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 579 (in Georgian).

[83] *Widmer P.,* Switzerland as a Special Case, 2012, p. 70.

[84] *Widmer P.,* Switzerland as a Special Case, 2012, p. 184.

[85] *Widmer P.,* Switzerland as a Special Case, 2012, p. 205.

[86] *Widmer P.,* Switzerland as a Special Case, 2012, p. 17.

[87] Discussion of the Constitution in the Constituent Assembly, Sitting of 17 December, Speech of *R. Arsenidze,* The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 638 (in Georgian).

order to prove this, he mentioned three factors: 1. The organization of the executive branch; 2. The broad mandate of the legislature; 3. The relationship between the central government and local self-governments.[88] Each of these should be considered in detail.

V. THE ORGANIZATION OF THE EXECUTIVE BRANCH

1. THE SEPARATION OF POWERS (THE ROLE OF THE GOVERNMENT)

The attitude of non-intermediary democracy towards the concept of the separation of powers need to be reviewed at this point. It requires conferring unlimited power to the representative body, which enjoys public trust. That is why the idea of *Charles-Louis Montesquieu* does not work here. *Pavle Sakvarelidze* characterizes the system in this way: 'In the relationship of the government and the parliament the principles of agreement and coordinated action do not apply [...]; the principle of domination [works] instead. In every aspect the government is subordinated to the parliament.'[89] He points to Switzerland as an example of this system.[90] The Socialist Federalists viewed the problem in the same light; *Samson Dadiani* stated before the Constituent Assembly, that the absolute separation of powers was unacceptable for his party.[91] The whole constitutional system was arranged according to this principle: the people occupied the highest place and were followed by the parliament. The government looked so weak compared to the powers of the parliament, that one of the scholar in a reproaching manner stated: 'the Constitution provided for an unusual system of government – essentially it consisted of two branches – the legislature and the judiciary. There was no strong executive branch, particularly not one that could stand on equal footing with the other two by its status, as it is the case in some democratic states.'[92] In other words:

The system of government provided by the first Georgian Constitution may be included in the group of European type parliamentary systems, which was popular at that time. However, in view of its many features, we cannot say, that the Constitution provided for equally powerful three government branches, as it did not entrench perfected mechanisms of influence of the executive branch on the parliament or *vice versa*,

[88] Discussion of the Constitution in the Constituent Assembly, Sitting of 17 December, Speech of *R. Arsenidze,* The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 638 (in Georgian).
[89] *Sakvarelidze P.,* For the Constitution of Georgia, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 313 (in Georgian).
[90] Meeting of the Constitutional Commission, 11 June 1918, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 26 (in Georgian).
[91] Constituent Assembly, Sitting of 8 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 613 (in Georgian).
[92] *Lee E.,* The Experiment, The Forgotten Revolution of Georgia 1918-1921, 2018, p. 252.

the mechanisms of influence of the parliament on the executive branch. Among the characteristics of the system of government, which distinguishes this constitutional model from other parliamentary systems of that time, is the absence of the neutral institution of the president (or the monarch in case of the constitutional monarchy), the entrenchment of only individual liability of the government members, the absence of power of the government to dissolve the parliament during crises, etc.[93]

All these concerns are invalidated after the realization of one conceptual issues. It is related to the *Marxist* understanding of the form of government, which opposes the parliamentary model and is similar to the Swiss system, which was adjusted to the Georgian context and improved by the Georgian Social Democrats. Naturally, something that is not a parliamentary model, will also not fit within its framework (even though, some scholars categorized the 1921 model as a super-parliamentary system[94]). This is not an unsuitable criterion, it cannot measure the Constitution of the First Republic. This system should be viewed through the concept of non-intermediary democracy.

2. POLITICAL RESPONSIBILITY OF THE EXECUTIVE BRANCH

In his work 'Civil War in France', *Karl Marx* did not hide his sympathies for the Paris Commune, when he describes the aspiration of the *'communards'* to organize a new republic. This account reveals his critical opinion of the *Charles-Louis Montesquieuan* idea of the separation of powers. This is a rare case, when *Karl Marx* focuses on the relationship between the legislative and the executive branches and prefers a structure with unified legislative and executive powers, where the relationships between the political branches, characteristic to parliamentary republics, is absent. 'Commune was not meant to be a parliamentary institution, but rather a working corporation, which would be the legislator and the executor of laws at the same time'- he wrote.[95] *Karl Marx* alludes here to the specific arrangement of the Commune, which distinguished it from the parliamentary system. The Commune formed ten commissions out of its composition,[96] each of them consisting of 5-8 members.[97] 'It constituted the genuine government of the Commune.'[98] As early as June 1918, at the outset of the discussions on the Constitution, *Noe Zhordania* was advocating the idea, which was very close

[93] P*apuashvili G.,* 1921 Constitution of the Democratic Republic of Georgia: Looking Back after Ninety Years, in: '1921 Constitution of the Democratic Republic of Georgia', 2nd edition, 2013, p. 20 (in Georgian).

[94] *Gegenava D., Papashvili T., Vardosanidze K., Goradze G., Bregadze R., Tevzadze T., Tsanava T., Javakhishvili P., Macharadze Z., Sioridze G., Loladze B.,* Introduction to the Constitutional Law of Georgia, 2019, p. 41 (in Georgian).

[95] *Marx K.,* The Civil War in France, in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 599.

[96] *Mtvarelidze D.,* The Paris Commune, 2nd revised edition, 1931, p. 60 (in Georgian).

[97] *Mtvarelidze D.,* The Paris Commune, 2nd revised edition, 1931, p. 60 (in Georgian).

[98] *Mtvarelidze D.,* The Paris Commune, 2nd revised edition, 1931, p. 60 (in Georgian).

to that of the organization of the Commune. He thought that the Parliament had to be assigned with both the legislative and the executive powers and functions.[99]

To better understand the system implied by *Karl Marx* under the 'parliamentary institution', the main feature characterizing this system, that is the conceptualization of the cabinet as a political unit, should be mentioned. There is also an opposing opinion, that the government is the technical executor of the decisions of the legislature and its separation as a different constitutional institution does not in any way imply its political actorship.

In the often-quoted speech of 1918 by *Noe Zhordania*, he clearly distinguished between two types of government. In his opinion, the democratic form of republican government is characterized by the non-political nature of the government, which serves to weaken the parliamentary majority and the bourgeoisie.[100] The parliamentary cabinet depends on the majority, which is ever-changing[101] and is subordinated to it only. In contrast to this, in a democratic republic the cabinet is a 'working collegium'.[102] It is subordinated not only to the representatives of the people, but also to the decisions of the people and this subordination is unconditional.[103] This principle is also discussed by *Rajden Arsenidze* in the commentary to the Draft Constitution. He asserted, that the draft was based on the principle of government subordination to (i.e. the execution of instructions of) the parliament.[104] *Noe Zhordania* noted additionally, that government cannot organize itself without the people, it can neither act against the interests of the people.[105] This is due to the fact that there is a link between the people and the government. The government is not dissolved according to the political opinions of the majority, but for the work-related

[99] Sitting of 22 June 1918 of the Constitutional Commission, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, p. 31 (in Georgian).
[100] *Zhordania N.*, Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 76 (in Georgian).
[101] *Zhordania N.*, Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 76 (in Georgian).
[102] *Zhordania N.*, Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 76 (in Georgian).
[103] *Zhordania N.*, Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 76 (in Georgian).
[104] The Executive Power, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 849 (in Georgian). Presumably, this document is an explanatory note to the Sample Draft authored by *R. Arsenidze*.
[105] *Zhordania N.*, Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 76 (in Georgian).

viewpoints instead.[106] In this system the cabinet does not change after the change of the majority.[107] Once appointed, the minister continues to work at the position until the next elections of the parliament.[108] For *Noe Zhordania*, they are 'neither leaders, nor political statesmen', they are only administrative officials.[109]

Noe Zhordania spoke again on the relationship between the parliament and government after a year and a half in his speech of December 1920. Here, he elaborated on the difference between the dismissal of the government for political and work-related purposes. He thought, that dismissal of the government according to the will of majority is a characteristic of parliamentarism.[110] In the commentary to the draft *Rajden Arsenidze* also referred to the accountability of the government to the parliament, as a feature of parliamentarism, when he was characterizing the entrenched system and thought, that this element distinguished the offered system from the Swiss model.[111]

The second issue for *Noe Zhordania* is the procedure of the resignation of the government. In his opinion parliamentarism allows the opportunity for the government to resign for insufficient reasons. 'Here, it is possible that the parliament approves of the general direction of the governmental policy, but sees an error related to the specific case and, as they say, if it reproaches the government using a specific formula, the government will have to resign.'[112] When he juxtaposes the parliamentarism with the example of Switzerland, *Pavle Sakvarelidze* also notes, that the government does not resign here, if its bill fails to to be passed into law.[113] *Noe Zhordania* believed, that neither the government, nor the individual minister had to resign, if only their isolated acts are criticized by the parliament. Dissolution is only an option, when the majority makes decision thereto.[114]

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[106] *Zhordania N.*, Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 76 (in Georgian).

[107] Sitting of 22 June, 1918 of the Constitutional Commission, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, p. 31 (in Georgian).

[108] Sitting of 22 June, 1918 of the Constitutional Commission, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, p. 31 (in Georgian).

[109] Sitting of 22 June, 1918 of the Constitutional Commission, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, p. 31 (in Georgian).

[110] Speech of Chairperson of the Government, *N. Zhordania*, Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 606 (in Georgian).

[111] The Executive Power, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 849 (in Georgian).

[112] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 606 (in Georgian).

[113] *Sakvarelidze P.,* For the Constitution of Georgia, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 314 (in Georgian).

[114] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 606 (in Georgian).

When distinguishing parliamentarism from a democratic republic, it is decisive for *Noe Zhordania* to examine the interrelationship between these three issues:[115] 1. general political direction, 2. individual practical issues and 3. governmental crisis.

In his opinion, if there is a consensus on the general political agenda in the democratic republic, different opinions on a specific issue cannot cause crisis.[116] This is ensured by the so-called obedience principle, according to which the government is obliged to obey the resolution of parliament and to enforce it, regardless of whether it agrees with the parliament or not.[117] On the other side, it is obligated to resign in case of such a conflict in parliamentarism, which leads to a crisis.[118] *Noe Zhordania* concluded, that a democratic republic rules out the 'crises principle'.[119] The Social Democrat *Aleksandre Mdivani* also shared this opinion, that in a non-intermediary democracy the government does not have a political role, while on the other side, when there is a conflict of opinions, the government enforces the will of the parliament.[120] But what happens, if the government does not perform the assigned task? Criminal liability is an answer.[121] This system does not constitute the separation of powers, but rather the 'subordination of power'.[122] At the top of the system are the people, that subordinate the whole state apparatus through the parliament and other institutions.

Noe Zhordania identifies a government composed of civil servants and the irremovability of ministers as the main characteristics of democratic regimes.[123] Switzerland is the example of the latter, where members of the federal council cannot be dismissed through

[115] Speech of Chairperson of the Government, *N. Zhordania*, Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 606 (in Georgian).
[116] Speech of Chairperson of the Government, *N. Zhordania*, Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 606 (in Georgian).
[117] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 606-607 (in Georgian).
[118] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 607 (in Georgian).
[119] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 607 (in Georgian).
[120] *Mdivani A.,* Government and Its Accountability, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 294 (in Georgian).
[121] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, pp. 83-86 (in Georgian).
[122] *Sakvarelidze P.,* Letters on the Political Order of Different Countries, p. 126 (in Georgian).
[123] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 608 (in Georgian).

the no-confidence vote.[124] *Pavle Sakvarelidze* also referred to Switzerland, when he wrote, that here the 'government is not politically accountable [...]. Until the end of the office the government or its member cannot be dismissed [by the Parliament]'.[125] The reason therefor is that the government i.e. the federal council is an administrative body.[126] This is confirmed by *Paul Widmer*, who wrote the following: the government of Switzerland is just an administration.[127] In a direct democracy, people govern, while the government is composed of temporary advisors. However, *Noe Zhordania* thought, that the purely Swiss model would not fit Georgia and a political government was needed instead of a government of civil servants.[128] He pointed to the special foreign policy challenges as an argument.[129] *Akaki Chkhenkeli* essentially shared this opinion.[130] Nonetheless, *Noe Zhordania* believed, that Georgia had to adopt the Swiss experience relating to the head of government. The government had to have a chairperson, who would supervise the performance of duties by the ministers.[131] From here he inferred the idea, that he offered to the Constituent Assembly. According to this idea, the chairperson of the government had to be elected for a certain term of office, during which they could not be held politically accountable.[132] 'The ministers may change, or all of them may leave, but one person, with the functions of the president, the representative of the state, has to remain in office.'[133] This stance was also taken by *Akaki Chkhenkeli*, however, he noted that the draft already entrenched accountable government and unaccountable chairperson of the government.[134] A Regulation different from this vision is provided

[124] *Haller W.*, The Swiss Constitution in a Comparative Context, 2012, pp. 160-161.
[125] *Sakvarelidze P.,* Letters on the Political Order of Different Countries, p. 124 (in Georgian).
[126] *Sakvarelidze P.,* Letters on the Political Order of Different Countries, p. 124 (in Georgian).
[127] *Widmer P.,* Switzerland as a Special Case, 2012, p. 232.
[128] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 609 (in Georgian).
[129] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 609 (in Georgian).
[130] Discussion of the Constitution in the Constituent Assembly, Sitting of 17 December, Speech of *A. Chkhenkeli,* The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 662 (in Georgian).
[131] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 608 (in Georgian).
[132] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 608 (in Georgian).
[133] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 608-609 (in Georgian).
[134] Discussion of the Constitution in the Constituent Assembly, Sitting of 17 December, Speech of *A. Chkhenkeli,* The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 670 (in Georgian).

in the draft that was submitted to the Constituent Assembly in May 1920, where the government (including the prime minister) is subject to the political no-confidence vote as a body,[135] while the term of office of the chairperson of the government is not determined.[136]

The former President of the Constitutional Court, *Giorgi Papuashvili* thinks, that the Constitution provided for the individual liability of the chairperson of the government,[137] but in addition to the explanations above, the text of the Constitution itself reveals that the vision of *Noe Zhordania* got incorporated in the supreme law at the end, according to which the parliament could not dismiss the chairperson of the government,[138] in contrast to procedure of the no-confidence vote against individual ministers, in which case they are obliged to resign.[139] Thus, *Noe Zhordania's* vision was shared by the Constituent Assembly and the principle of political accountability of ministers was incorporated into the model of direct democracy. According to this model, the relationship of the chairperson of government with the parliament was based on the 'obedience principle'. The Chairperson was obligated to enforce all the resolutions of the Parliament,[140] whether they agreed with them or not. A disagreement would not automatically result in the resignation of the chairperson. It appears, that prior to the adoption of the Constitution, the same rule was applied in practice. As *Noe*

[135] Draft Constitution of Georgia adopted by the Constitutional Commission of the Constituent Assembly, May 1920, Article 83, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 442 (in Georgian).

[136] Draft Constitution of Georgia adopted by the Constitutional Commission of the Constituent Assembly, May 1920, Article 83, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 440 (in Georgian).

[137] *Papuashvili G.,* 1921 Constitution of the Democratic Republic of Georgia: Looking Back after Ninety Years, in: '1921 Constitution of the Democratic Republic of Georgia', 2nd edition, 2013, p. 26 (in Georgian).

[138] The systemic analysis of the Constitution reveals it. The Chapter V (Executive Power) provides the sequence of Articles regulating the Chairperson of Government, Deputy Chairperson, Government and Ministers. Article 70 applies to the Chairperson of Government and does not state anything related to their resignation mechanism. Article 71 applies to the Deputy Chairperson and it only states, that this person substitutes the Chairperson of the Government. Article 72 enlists the rights and duties of the Government. Article 73, Paragraph 1 applies to the Ministers. It states the following: 'Each member of the government manages independently, and under sole, personal responsibility to parliament, the department confided to him. He must resign as soon as he loses the confidence of parliament, as expressed in the explicit resolution.' It appears, that this provision does not apply to the Chairperson of the Government, as no department is confided to them. The word 'responsible' in Article 73, Paragraph 2, which describe the relationship between the Parliament and the Chairperson of Government also does not provide the possibility of political no-confidence and mostly refers to the principle of obedience, which implies legal responsibility.

[139] 1921 Constitution of Democratic Republic od Georgia, Article 73, Paragraph 1, Clause 2, available at: <https://matsne.gov.ge/document/view/4801430?publication=0> (accessed 15.7.2021).

[140] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 609 (in Georgian).

Zhordania himself noted: 'Often the government and I, your respectful servant, do not agree with your resolutions, but we execute them'[141] (as in Switzerland, according to *Pavle Sakvarelidze*[142]). It is interesting, that the obligation of the chairperson of government to change the minister (as part of the individual political accountability of ministers) at the demand of the parliament takes them out of the frames of the obedience principle i.e. out of democratism. This vision is also shared by *Rajden Arsenidze*, who considered the election of the chairperson of government by the parliament as the determination of political direction of the government by the parliament: 'the chairperson of government should obey every decision of the parliament. The ministries follow this direction and in the process of enforcement they are politically accountable. [...] Every deviation from this policy, failure to enforce that political direction leads to accountability.'[143] This fact should not be ignored. Formally, political accountability is the tool of parliamentarism, however, its incorporation in the system of democratic republic transforms it to its core and detaches it from its roots. In parliamentarism political accountability empowers the government; it has the privilege of resignation in case of a disagreement, hence, it can thereby generate a crisis, which means that it can influence the parliament by blackmailing it with a crisis; in the Georgian model it is deprived of this leverage.

It is hard to pinpoint the precise time, when the ruling party gave consent to individual political accountability. Maybe, this modification of the system of government was shared by the Social Democrats due to the influence of *Rajden Arsenidze's* old ideas. As yearly as 1917, he wrote that it necessary to have ministries, that would be elected from the composition of the parliament and would be accountable to the parliament, as in this case the parliament, and therethrough the people, will have both the legislative and the executive powers.[144] Thus, this tool of parliamentarism (political accountability) once introduced in the system of non-intermediary democracy, is merged with it and becomes its natural part. This does not generate a mixed system, which is partially parliamentarian and partially direct democracy, it constitutes full democratism instead, that becomes even more perfect through this addition. It subjects the government to the political will of the people even further and eradicates the flaw, expressed through the forced toleration of a useless minister until the end of their term in case of the fixed-term government. Presumably, The same reason served as a ground for

[141] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 607 (in Georgian).

[142] *Sakvarelidze P.,* Letters on the Political Order of Different Countries, p. 125 (in Georgian).

[143] Discussion of the Constitution in the Constituent Assembly, Sitting of 17 December, Speech of *R. Arsenidze,* The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 644 (in Georgian).

[144] *Arsenidze R.,* Democratic Republic, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 59 (in Georgian).

the negation of collective accountability and not, as part of the scholars argue, the absence of bicameralism or the non-existence of the office of the head of the state.[145]

However, we should once again turn to this issue and review it in detail. It is noteworthy, that this stance of *Noe Zhordania* contradicts his original vision, that it was exactly the prime minister, to whom the political accountability principle had to be applied (together with the ministers of interior and foreign affairs).[146] *Noe Zhordania* presented this idea as a transitional measure.[147] It seems that, after a certain period, *Noe Zhordania* changed his position and leaned further towards the principle of democracy. In any case, in his speech of December 1920, he was clearly discontented with the submitted draft (which provided for collective accountability and no-confidence vote against the prime minister[148]). He realized that his peers were driven in the direction of parliamentarism and he tried to return them to the old path. In his opinion, despite the fact that the principles of this vision were entrenched in the draft, results were not guaranteed and he reproached his fellows for their steps in the direction of parliamentarism[149], which was followed by an awful prediction: 'If we will build the Constitution, as it is written here, within one month it will either ruin itself, or it will ruin the state.'[150] Therefore, the interpretation of this speech of *Noe Zhordania* in a way, that considers the December speech as a step away from the principle of the democratic republic towards parliamentarianism, should be questioned.[151] Actually, the very opposite of that is true.

It is interesting that the Socialist Federalist, *Samson Dadiani* opposed the individual accountability and called for collective accountability[152], which was originally decided

[145] *Papuashvili G.,* 1921 Constitution of the Democratic Republic of Georgia: Looking Back after Ninety Years, in: '1921 Constitution of the Democratic Republic of Georgia', 2nd edition, 2013, p. 27 (in Georgian); *Gegenava D., Kantaria B., Tsanava L., Tevzadze T., Macharashvili Z., Javakhishvili P., Erkvania T., Papashvili T.,* Constitutional Law of Georgia, 2nd edition, 2016, p. 40 (in Georgian).

[146] Sitting of 22 June, 1918 of the Constitutional Commission, The Constitution of the First Republic of Georgia (1921) Materials and Documents, Volume I, p. 31 (in Georgian).

[147] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 72 (in Georgian).

[148] Draft Constitution of Georgia adopted by the Constitutional Commission of the Constituent Assembly, May 1920, Article 83, Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 442 (in Georgian).

[149] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 605 (in Georgian).

[150] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 605 (in Georgian).

[151] *Kantaria B.,* Principles of the Western Constitutionalism and Legal Nature of the Form of Government in the First Georgian Constitution, 2012, p. 144 (in Georgian).

[152] The Constituent Assembly, Sitting of 8 December, The Constitution of the First Republic of Georgia

that way. The debates on this issue were held on 21 April 1920 in the Commission, where the chapter on government, prepared by *Rajden Arsenidze,* was discussed and it included the idea of collective accountability.[153] *Sergi Japaridze* advocated the model of unaccountable government, however, this idea was not accepted.[154] At the end of the discussion, the principle of collective accountability was maintained. In the explanatory note to the document, *Rajden Arsenidze* (who was presumably the author of this text) revealed the intention of the Constitutional Commission, 'to subject the fate of the Cabinet to the majority vote in the Parliament'[155], which implied the sanction as an expression of the collective accountability.[156]

In his address to the Constituent Assembly, discussing this issue *Akaki Chkhenkeli* focused on the obligation of the government to resign only if the issue of its collective accountability was raised by the parliament.[157] In his opinion this was an expression of the obedience principle,[158] while it was noted in the commentary to the draft, that the collectively accountable cabinet is a parliamentary cabinet,[159] which contradicts the direct democracy model of organization of executive power. 'The direct democracy aspires to put the executive collegium composed of civil servants at the top of the government.'[160] Finally, *Rajden Arsenidze* concludes, that the draft proposes the mixed French-Swiss system, where parliamentarism is merged with direct democracy.[161]

The head of the Commission, *Pavle Sakvarelidze* believed, that mixing these two principles would provide the country with the best form of government,[162] but it would

(1921), Materials and Documents, Volume II, pp. 615-616 (in Georgian).

[153] Executive Power, The Sample Draft of *R. Arsenidze,* The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 848 (in Georgian).

[154] Journal of Sittings of the Constitutional Commission of the Constituent Assembly, 21 April 1920, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 381 (in Georgian).

[155] The Executive Power, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 864 (in Georgian).

[156] The Executive Power, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 864 (in Georgian).

[157] Discussion of the Constitution in the Constituent Assembly, Sitting of 19 December, Speech of *A. Chkhenkeli,* The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 662 (in Georgian).

[158] Discussion of the Constitution in the Constituent Assembly, Sitting of 19 December, Speech of *A. Chkhenkeli,* The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 662 (in Georgian).

[159] The Executive Power, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 860 (in Georgian).

[160] The Executive Power, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 849 (in Georgian).

[161] The Executive Power, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 849 (in Georgian).

[162] *Sakvarelidze P.,* For the Constitution of Georgia, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 318 (in Georgian).

tip the system towards the parliamentary model. *Pavle Sakvarelidze* elaborated on his opinions in 1920, when the draft was published and he advocated the need for collective accountability of the government, which was entrenched in the draft[163] (albeit, it was not included in the final text of the Constitution)[164]. He believed that from the time of the gaining of independence until that moment, Georgia had a parliamentary government,[165] however, it was balanced through 'the initiative of the referendum provided by the Draft Constitution, by the annual election of the chairperson, by granting the chairperson of government the role of a representative of the whole republic, by the prohibition of the consecutive re-election of the same person in the position of the chair of the government, etc'.[166] However, the principle of collective accountability had never been applied in practice in the First Republic, which is clear from the above-mentioned speech of *Noe Zhordania*. It appears that *Pavle Sakvarelidze* was not aligned with the theory of *Noe Zhordania* and *Rajden Arsenidze* at the end. The presence of theoretical disagreement was soon proved by the fact that at the beginning of 1921 *Pavle Sakvarelidze* left the Party and founded the 'Independent Social Democratic Party - Ray'.[167]

Critically has to be viewed the opinions of several contemporary authors as well: according to them, the founders of the First Republic 'chose the path of parliamentarism'[168]. They consider, that the 'organization of state bodies is based [...] on parliamentarism – on the ideas of political accountability of government to the parliament and the supremacy of the parliament'.[169] Bolder legal assessments are also made: 'Georgia at that time was a parliamentary republic'[170], but after the superficial review of the features of parliamentarism, in a few lines, this statement loses it persuasiveness and names the constitutional model of 1921 Constitution as 'somehow close' to the construction of

[163] *Sakvarelidze P.,* For the Constitution of Georgia, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 314 (in Georgian).

[164] According to *P. Sakvarelidze,* 'Under our Constitution, the Government should be collectively accountable to the Parliament for the general policy [...] as it is stated in the Draft Constitution'. *Sakvarelidze P.,* For the Constitution of Georgia, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 316 (in Georgian). However, at the end the Constitution did not include the principle of collective accountability for the general policy.

[165] *Sakvarelidze P.,* For the Constitution of Georgia, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 316 (in Georgian).

[166] *Sakvarelidze P.,* For the Constitution of Georgia, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 315 (in Georgian).

[167] Collection of Biographies of the Deputies of the Constituent Assembly of the Democratic Republic of Georgia, available at: <http://firstrepublic.ge/ka/biography/174>, (accessed 1.7.2021).

[168] *Gegenava D., Kantaria B., Tsanava L., Tevzadze T., Macharashvili Z., Javakhishvili P., Erkvania T., Papashvili T.,* Constitutional Law of Georgia, 2nd edition, 2016, p. 39 (in Georgian).

[169] *Gegenava D., Kantaria B., Tsanava L., Tevzadze T., Macharashvili Z., Javakhishvili P., Erkvania T., Papashvili T.,* Constitutional Law of Georgia, 2nd edition, 2016, p. 41 (in Georgian).

[170] *Kantaria B.,* Principles of the Western Constitutionalism and Legal Nature of the Form of Government in the First Georgian Constitution, 2012, p. 10 (in Georgian).

the parliamentary government.[171] This opinion is accurate, if the principle of political accountability of government to the parliament is considered as the main feature of parliamentarism,[172] but it becomes false, when the attempt is made to frame the incorporation of the features of parliamentarism in the non-intermediary democracy model as a step towards the parliamentary republic. It does not account for the improvement, a step forward in the theory of non-intermediary democracy, which was emanated by the entrenchment of individual accountability of ministers.

The introduction of the 'accountable government' by the Social Democrats (in the form of the entrenchment of individual accountability of ministers, except for the chairperson of the government) was not a compromise; on the contrary, it was the strengthening of the direct democracy in view of the subordination of the government to the parliament. The functions of government, its 'busy' nature is what matters for the non-intermediary democracy and not, whether it will be politically accountable or not.

3. COLLEGIAL GOVERNANCE

In addition to subordination (domination), the direct democracy is characterized by another principle, namely, the power sharing, which *Paul Widmer* poses as a counterbalance to the separation of powers.[173] Here, the decisions are made collectively, which in its turn provides insurance for errors and ensures the sharing of responsibility. The invited member of the Constitutional Commission, *Konstantine Mikeladze* thought that collective decision-making (collegiality) is a characteristic for the executive power in those systems of government, 'where people have direct and immediate influence on the granting of rights and the administration of the state'.[174]

When choosing the non-intermediary democracy, the framers of the Constitution were fully aware of this factor. Two active members of the Constitutional Commission, *Rajden Arsenidze* ('Our Constitution does not establish a personal organization, it founds only a collective organization'[175]) and *Konstantine Japaridze* ('Democratism requires collective rule and government. This system worked well with the hindsight of the last three years and it should be maintained'[176]) discussed this issue. When *Rajden*

[171] *Kantaria B.,* Principles of the Western Constitutionalism and Legal Nature of the Form of Government in the First Georgian Constitution, 2012, p. 10 (in Georgian).
[172] *Gegenava D., Kantaria B., Tsanava L., Tevzadze T., Macharashvili Z., Javakhishvili P., Erkvania T., Papashvili T.,* Constitutional Law of Georgia, 2nd edition, 2016, p. 39 (in Georgian).
[173] *Widmer P.,* Switzerland as a Special Case, 2012, p. 353 (in Georgian).
[174] *Mikeladze K.,* Constitution of the Democratic Republic and Parliamentary Republic, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 44 (in Georgian).
[175] *Kantaria B.,* Principles of the Western Constitutionalism and Legal Nature of the Form of Government in the First Georgian Constitution, 2012, p. 62 (in Georgian).
[176] Discussion of the Constitution in the Constituent Assembly, Sitting of 15 December, Speech of *K.*

Arsenidze addressed the Constituent Assembly, he emphasized that the main feature of the a democratic republic is the collective nature (collegiality) of the executive power.[177] In Switzerland this approach led to, what was termed by *Paul Widmer*, referring to *Jürgen Habermas,* the transformation of the decisionist democracy into deliberative democracy.[178]

4. THE NEGATION OF THE INSTITUTION OF THE PRESIDENCY

The discussions on the Constitution in the bodies of the First Republic of Georgia was constantly marked by the negative attitude, reaching the level of intuitive negation of any slightest materialization of the position of the head of state. When they had an opportunity, the Social Democrats were eager to criticize the institution of presidency (the criticism of monarchy was not relevant at that time). This attitude stems from *Karl Marx*. In 'the Class Struggles in France' *Karl Marx* opposed the institution of presidency, as he considered it contradictory to have simultaneously two sovereigns, the president and the national assembly.[179] Moreover, in 'the Eighteenth Brumaire' *Karl Marx* wrote, that the Constitution invalidates itself, when it introduces the institution of a directly elected president, which has personal ties with the nation,[180] as a result, 'the president possesses a sort of divine right against the national assembly'.[181] He viewed the 'substitution of the constant, unaccountable, hereditary royal rule by the temporary, accountable and elected rule of a four-year presidency' as the legalization of dictatorship.[182]

The issue of presidency was fiercely discussed in the Constitutional Commission from the very beginning. On 14 June 1918, the topic of the executive power was discussed and, naturally, the first issue considered was the institution of presidency, which was mainly lobbied by the National Democratic Party through *Giorgi Gvazava*. However, this proposal was dismissed,[183] as was the next proposal on the election of the head of

Japaridze, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 624 (in Georgian).

[177] Discussion of the Constitution in the Constituent Assembly, Sitting of 17 December, Speech of *R. Arsenidze,* The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 641 (in Georgian).

[178] *Widmer P.,* Switzerland as a Special Case, 2012, p. 262.

[179] *Marx K.,* The Class Struggle in France, 1848-1850 in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 177.

[180] *Marx K.,* The Class Struggle in France, 1848-1850 in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, pp. 184-185.

[181] *Marx K.,* The Class Struggle in France, 1848-1850 in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 185.

[182] *Marx K.,* The Class Struggle in France, 1848-1850 in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 175.

[183] The Constitutional Commission, Wednesday, 14 June 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 88 (in Georgian).

government in the popular elections.[184] It is noteworthy that the original draft provided the office of the 'Chairperson of the Republic of Georgia' instead of the chairperson of the government, but the Commission dismissed it as well.[185] *Leo Natadze* proposed an idea, according to which the chairperson of the government should simultaneously serve as a chairperson of the parliament, but it seems, that the Commission did not disapprove of it either.[186] *Noe Zhordania* was also opposed to the institution of the presidency. In his December speech he emphasized, that the Constitution of Georgia would establish the office of the president.[187]

This institution was also opposed by the Socialist Federalists; *Samson Dadiani* delivered the speech during debates on the Constitution at the sitting of the Constituent Assembly: 'The president and the rights granted to this institution is unacceptable for our faction. In view of its powers, the president is the same as a king.'[188] *Rajden Arsenidze* called for a republic without a president and termed it as 'an elected king'[189]. He referred to the Swiss model as a solution instead.[190]

Karl Marx was the first pillar, on whom the Social Democrats based their protest against presidency; the second one was the Swiss experience. With regard to the presidency, the framers of the Constitution wanted to adopt the approach taken by that country.[191] *Paul Widmer* explained the Swiss model, stating that this people did not want to have a head of the state and a government, since 'no one except for the people should be granted the right to have the final say'.[192] *Aleksandre Mdivani* argued that the reason therefor was the fear of consolidating all the power in one person, as a result of which the Swiss people founded a collective body, the Federal Council.[193]

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[184] The Constitutional Commission, Wednesday, 14 June 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 88 (in Georgian).
[185] The Constitutional Commission, Wednesday, 14 June, 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 88 (in Georgian).
[186] The Constitutional Commission, Wednesday, 14 June, 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 88 (in Georgian).
[187] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, 609, p. 212 (in Georgian).
[188] The Constituent Assembly, Sitting of 8 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 613 (in Georgian).
[189] *Arsenidze R.,* Democratic Republic, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 49 (in Georgian).
[190] *Arsenidze R.,* Democratic Republic, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 51 (in Georgian).
[191] *Kantaria B.,* Principles of the Western Constitutionalism and Legal Nature of the Form of Government in the First Georgian Constitution, 2012, p. 85 (in Georgian).
[192] *Widmer P.,* Switzerland as a Special Case, 2012, pp. 158-159.
[193] *Mdivani A.,* Government and Its Accountability, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 295 (in Georgian).

Eric Lee explains the dismissal of presidency with two arguments:[194] 1. The inertia of the clash with Tsarism (this opinion is also shared by *Giorgi Papuashvili*;[195] the fear of the transformation of the president into a monarch is also discussed by a group of authors[196]); 2. The internal leadership culture of the party built in the previous years, which was related to the collective rule. *Giorgi Papuashvili* shares this second argument[197] as well and adds another argument – *Noe Zhordania's* lack of charisma. He states, 'considering the negative attitude towards this institution in the party, he [*Noe Zhordania*] himself opposed the introduction of presidency, which at the end, appeared to be the decisive factor against its introduction'.[198] It seems that *Noe Zhordania* supported the existence of the office of the head of the state, but stepped back after facing the opposition of the representatives of his party. However, there is no document that would prove (neither does the author of this opinion cite any source) that *Noe Zhordania* actually supported the introduction of presidency. As to the first two arguments, they are of secondary importance. What matters is the fact that the non-intermediary democracy cannot be reconciled with presidency.

The Socialist Federalists also opposed to this, but they did not share the model proposed by the Social Democrats either. They believed, that the status of the chairperson of the government provided by the draft amounted to the status of president in practice, it was just named differently (Chairperson of the government). This argument was articulated by *Leo Shengelia* at the sitting of the Constituent Assembly.[199] Now we should check the reasons for this approach.

5. THE CHAIRPERSON OF THE GOVERNMENT AND THE CABINET

After the negation of presidency, the issue of the chairperson of the government appeared on the agenda. At first, there was an idea to choose the chairperson for only one year and

[194] *Lee E.,* The Experiment, The Forgotten Revolution of Georgia 1918-1921, 2018, p. 254.
[195] *Papuashvili G.,* 1921 Constitution of the Democratic Republic of Georgia: Looking Back after Ninety Years, in: '1921 Constitution of the Democratic Republic of Georgia', 2nd edition, 2013, p. 24 (in Georgian).
[196] *Gegenava D., Kantaria B., Tsanava L., Tevzadze T., Macharashvili Z., Javakhishvili P., Erkvania T., Papashvili T.,* Constitutional Law of Georgia, 2nd edition, 2016, p. 37 (in Georgian).
[197] *Papuashvili G.,* 1921 Constitution of the Democratic Republic of Georgia: Looking Back after Ninety Years, in: '1921 Constitution of the Democratic Republic of Georgia', 2nd edition, 2013, p. 24 (in Georgian).
[198] *Papuashvili G.,* 1921 Constitution of the Democratic Republic of Georgia: Looking Back after Ninety Years, in: '1921 Constitution of the Democratic Republic of Georgia', 2nd edition, 2013, p. 24 (in Georgian).
[199] The Constituent Assembly, Wednesday, 22 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 677 (in Georgian).

only one term of office. This principle was lobbied by *Pavle Sakvarelidze*.[200] However, as it was already mentioned above, in May 1920, the draft did not mention any term of office at all. During the following constitutional debates, at the sitting of 18 June, the Commission supported *Rajden Arsenidze's* idea regarding the annual election of the chairperson of the government (election for more than two terms was prohibited).[201] The same principle was advocated by *Viktor Tevzaia* before the Constituent Assembly. In his speech he supported the institution of the chairperson of the government, who could be elected for the maximum of two terms of office, which he justified by the supervision on the economic activities of the state.[202] Eventually, the Constitution incorporated the amendment proposed by *Rajden Arsenidze* and determined the one-year term of office of the chairperson of the government, including the right to be re-elected for one more term.

However, the Commission did not took the second suggestion of *Rajden Arsenidze* into account, which he presented at the sitting of 21 April 1920. According to this proposal, the phrase 'is the highest representative of the Republic', pertaining to the chairperson of the government, had to be substituted with the words 'is first among the equals'.[203] This idea was most probably inspired by the Swiss system. Finally and unfortunetely, the Constitution included a slightly modified version and the chairperson of the government was granted the status of the highest representative of the Republic.[204] The above-mentioned criticism of *Leo Shengelia* was nurtured by this exact part.[205] His argument was refuted by *Viktor Tevzaia*. At first, he opposed not only presidency, but the whole system. Later on he declared: 'We only want to ensure that the place of the government is not empty and, hence, we grant the chairperson of the government such rights, which will protect the state from this emptiness.'[206] In his opinion, this was the reason, why the chairperson of the government was granted more 'power and importance' than the head of the Federal Council of Switzerland.[207]

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[200] *Sakvarelidze P.,* For the Constitution of Georgia, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 310 (in Georgian).

[201] The Constitutional Commission, 18/VI – Wednesday, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 100 (in Georgian).

[202] The Constituent Assembly, Sitting of 14 December, Discussion of the Constitution, Speech of *V. Tevzaia,* The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 621 (in Georgian).

[203] The Constitutional Commission, Wednesday, 28 May, p. 77; Journal of the Sittings of the Constitutional Commission of the Constituent Assembly, 21 April, 1920, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 379-380 (in Georgian).

[204] 1921 Constitution of Georgia, Article 79, Paragraph 1, Clause 1, available at: <https://matsne.gov.ge/do cument/view/4801430?publication=0> (accessed 15.7.2021).

[205] The Constituent Assembly, Wednesday, 22 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 677 (in Georgian).

[206] The Constituent Assembly, Sitting of 8 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 615-616 (in Georgian).

[207] *Mdivani A.,* Government and Its Accountability, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 296 (in Georgian).

There is one important factor in this debate: the target of criticism of the Socialist Federalists was the highest representative functions of the chairperson of the government, but *Leo Shengelia's* criticism was based on a false assumption. The functions of the Federal President of Switzerland include the representation of the Confederation, both within the Country and abroad.[208] This was not the part, where the Georgian model diverged from the the Swiss system. In the draft of the Social Democrats, the prime minister was strengthened through the capacity to appoint the members of the government and exactly this is addressed by *Viktor Tevzaia* and *Aleksandre Mdivani*. In the remaining part, the powers of the chairperson and that of the other members of the government are identical (only their jurisdictions differ) – as *Rajden Arsenidze* points it out.[209] The powers of the chairperson of the government included 'neither the appointment of officials, nor the conclusion of the international treaties, the dissolution and summoning of the parliament or the highest management of state administration [...] The Chairperson could only lead negotiations with other states'.[210]

When the Constitutional Commission started to work, there were several versions of the composition of the government. *Noe Zhordania* had an idea, that the ministers should be appointed by the parliament (and not the prime minister), as officials without political accountability.[211] This was similar to the Swiss model, where the Assembly elects the members of the Federal Council.[212] *Rajden Arsenidze* proposed to the Commission, that the entire cabinet should be be presented to the parliament, however, this proposal did not receive any support[213] (he was advocating this idea early on[214]). The Commission also considered the issue of determining the minimal number of ministers, however, this version also failed.[215] Finally, it was decided to maintain the principle, that had already been applied in the country: the representative body had to elect the chairperson of the government, that would then form the cabinet.[216] This was criticized by the Socialist

[208] *Häfelin U., Haller W., Keller H., Thurnheer D.,* Swiss Federal State Law, Fully revised and enlarged 9th edition, 2019, p. 574.

[209] The Executive Power, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 854-855 (in Georgian).

[210] The Executive Power, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 855-856 (in Georgian).

[211] The Sitting of 22 June 1918 of the Constitutional Commission, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 31 (in Georgian).

[212] *Haller W.,* The Swiss Constitution in a Comparative Context, 2012, p. 157.

[213] The Constitutional Commission, Wednesday, 14 June 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 87-88 (in Georgian).

[214] *Arsenidze R.,* Democratic Republic, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 59 (in Georgian).

[215] The Constitutional Commission, Wednesday, 14 June 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 87 (in Georgian).

[216] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 608 (in Georgian); The Executive Power, The Constitution of the First Republic of Georgia (1921), Materials and

Revolutionary *Samson Dadiani* and he called this procedure a 'three-storied' rule of elections, where the 'ministers are far from people'.[217] The Social Democrats responded to this argument with the individual responsibility of the ministers.

VI. THE PARLIAMENT

1. THE POWERS AND THE TERM OF OFFICE

'Sovereignty belongs to the people: the Parliament exercises the people's sovereignty within the limits established by this Constitution'[218] – these words were included in the sample draft prepared by *Rajden Arsenidze*. The final Constitution states as follows: 'Dominion belongs to the whole nation, the Parliament exercises the dominion of the nation within the limits set by this Constitution.'[219] The practically undefined powers of the Parliament demonstrates that the architects of the supreme law were guided by the principle, according to which the non-intermediary democracy requires not only the direct involvement of the people in the decision-making process, but also broad powers of the Parliament.[220] *Rajden Arsenidze* fought to ensure that the powers of the Council were not enumerated in the Constitution, as all the powers belonged to it, other than those delegated by it to the government.[221] Finally, he did not succeed and the text of the onstitution includes the list of powers of the Parliament, but the respective legal norm is so broad, that it practically grants the legislature an all-embracing mandate.[222] The principle of parliamentary supremacy entails the negation of the executive veto as well.[223]

The short, three-year term of office of the legislature was written in the supreme law in order to bring the Parliament closer to the attitudes of the voters. However, it was thought originally, that the representatives had to occupy their positions for a shorter time. In his commentary on the sample draft, *Rajden Arsenidze* wrote, 'in this manner,

Documents, Volume II, pp. 849-850 (in Georgian).

[217] *Dadiani S.,* Our Constitution – Viewed in the Light of the Right to People's State, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 269 (in Georgian).

[218] The Executive Power, Sample Draft of *R. Arsenidze*, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 803 (in Georgian).

[219] 1921 Constitution of Georgia, Article 52, available at: <https://matsne.gov.ge/document/view/4801430?publication=0> (accessed 15.7.2021).

[220] *Haller W.,* The Swiss Constitution in a Comparative Context, 2012, p. 155.

[221] The Constitutional Commission, Sitting of 3 August 1918, The Constitution of the First Republic of Georgia (1921), Materials and Documents, p. 56 (in Georgian).

[222] 1921 Constitution of Georgia, Article 54, available at: <https://matsne.gov.ge/document/view/4801430?publication=0> (accessed 15.7.2021).

[223] Discussion of the Constitution in the Constituent Assembly, Sitting of 15 December, Speech of *K. Japaridze*, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 624 (in Georgian).

the representative body will reflect the nation more accurately. Thus, its work will approximate the actual outcomes of direct democracy.'[224] However, he also admits that the representative democracy still suffered from the problems related to representation. He thought, that the tool to eradicate this problem is the popular control, which is reflected in the term of office of the legislature. In view of *Rajden Arsenidze*, the term had to be two years.[225] Initially, the text drafted by *Rajden Arsenidze* stated so.[226] *Spiridon Kedia* and *Sergi Japaridze* preferred a three-year term, while *Giorgi Naneishvili* supported the idea to reduce the term even further.[227] The following sample draft included a two-year term.[228] The Commission considered the issue once again on 4 July 1919 and there it decided to elect the legislature for that term.[229]

After several months, at the sitting of 14 April 1920, *Sergi Japaridze* raised this issue before Commission again. He thought that that term was short and the Parliament would not be able to implement the policy that it promised, and frequent elections would overwhelm the people; the expenses had be to considered as well.[230] However, this issue was not considered anew due to the absence of a quorum. Finally, the decision to increase the term of the parliament to three years was made at the next sitting of the Commission.[231] From the perspective of direct democracy, this was a step back.

2. BICAMERALISM AND DISSOLUTION OF THE PARLIAMENT

The next debated issue was related to the structure of the Parliament. A unicameral parliament, elected by the people in the democratic procedure, was the ideal of the Social Democrats.[232] For *Rajden Arsenidze* a unicameral legislature was acceptable.

[224] The Parliament, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 808 (in Georgian). Presumably this document presents an explanatory note to the sample draft and it was authored by *R. Arsenidze*.

[225] *Arsenidze R.,* Democratic Republic, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 53 (in Georgian).

[226] Journal of the Sittings of the Constitutional Commission, 28 February 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, p. 209 (in Georgian).

[227] Journal of the Sittings of the Constitutional Commission, 28 February 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, pp. 210-211 (in Georgian).

[228] The Parliament, Sample Draft of *R. Arsenidze*, The Constitution of the First Republic of Georgia (1921), Materials and Documents, p. 226 (in Georgian).

[229] The Constitutional Commission, Wednesday, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 79-80 (in Georgian).

[230] Journal of the Sitting of the Constitutional Commission of the Constituent Assembly, 17 April 1920, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 369-370 (in Georgian).

[231] Journal of the Sitting of the Constitutional Commission of the Constituent Assembly, 17 April 1920, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 370 (in Georgian).

[232] Meeting of the Constitutional Commission, 11 June 1918, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 29 (in Georgian).

He considered the upper chamber to be undemocratic body, that represents the interests ofthe bourgeoisie, mostly due to the two-tiered system of its elections.[233] *Pavle Sakvarelidze* also advocated this position and brought the example of the Swiss cantons, where the legislatures are usually unicameral.[234] *Sergi Japaridze* even called the upper chamber a reactionary event,[235] while *Rajden Arsenidze* viewed it as a possibility of the politicization of the local self-government units, and therefore opposed it.[236] The National Democrat *Spiridon Kedia* supported the idea of a bicameral system.[237]

Another issue was the dissolution of the parliament. The framers of the Constitution ruled out the inclusion of this mechanism in the Constitution throughout the whole process and at the end it remained that way. There was no mechanism for the dissolution of the parliament. The reason therefor was that the allowance of its dissolution would imply that 'there was a body with a higher authority, which would limit the sovereignty of the Parliament'.[238] *Rajden Arsenidze* wrote that the only mechanism to let the Parliament go home, is for the peple to make such decision through a referendum.[239] The people, who are as the source of the power, could change the Parliament, both through regular and extraordinary elections.[240] This part could lead to certain ambiguities. Neither the any of the drafts, nor the Constitution itself states anything in this regard, however, it seems, that *Rajden Arsenidze* allowed the possibility of a such referendum after constitutional intepretations and considered it to be an important mechanism.[241] In this respect, the Georgian Social Democrats were inspired by the example of several cantons.[242] This tool is still maintained in Switzerland today, even though 'it rarely has any practical significance'.[243]

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[233] Journal of the Sitting, 2/IV-19, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, p. 47 (in Georgian).

[234] *Sakvarelidze P.*, Letters on the Political Order of Different Countries, p. 127 (in Georgian).

[235] Journal of the Sitting of the Constitutional Commission of the Constituent Assembly, 28 February 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, p. 212 (in Georgian).

[236] Journal of the Sitting of the Constitutional Commission, 28 February 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, pp. 210-213 (in Georgian).

[237] Journal of the Sitting of the Constitutional Commission, 28 February 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, p. 214 (in Georgian).

[238] The Parliament, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 823 (in Georgian).

[239] The Parliament, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 824 (in Georgian).

[240] The Parliament, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 824 (in Georgian).

[241] The Parliament, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 824 (in Georgian).

[242] *Sakvarelidze P.*, For the Constitution of Georgia, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 310 (in Georgian).

[243] *Haller W.*, The Swiss Constitution in a Comparative Context, 2012, p. 127.

3. THE ELECTORAL SYSTEM

Karl Marx viewed the elections as a mechanism of representation of diverse interests of the society in the legislature, the task that was best accomplished through the proportional election system. He thought that the elections can 'reveal real people i.e. representatives of different classes'.[244] He supported the idea of universal suffrage, as 'one of the first and most important tasks of the militant proletariat',[245] as a 'tool of liberation'.[246] Moreover, *Karl Marx* considered that this mechanism changed not only the core of the understanding of the state, but also the fight strategy of the proletariat. If earlier, the bourgeoisie used the state agencies for the organization of its domination, now the working class would employ them for the fight against the same agencies.[247] For *Karl Marx*, the Paris Commune was an example of the social organization, which solved the tasks, posed by the socialist ideas to the state unity. He considered that 'the Paris Commune created 'a political form, which enabled the economic liberation of labor'.[248] Moreover, *Friedrich Engels*[249] considered the general elections (along with the imperative mandates) as one of the two trustworthy measures to transform the state and state institutions from masters of the society into its servants.[250] In turn, *Karl Marx* considered the general elections as particularly important among the reforms implemented by the Commune.[251] Earlier, the Socialists reproached Switzerland precisely for the form of elections, the absence of a proportional elections,[252] until the consensus was reached in 1918 and as a result of a popular initiative the Swiss Constitution was amended, 'which gave rise to a rigorous movement of workers to reach more adequate representation in the bodies of federal government'.[253]

Naturally, the Georgian *Marxists*, who were granted the role of the determination of the institutional framework of the state by historical fate, also shared this position. The newspaper 'Kvali' [the Path] had been writing as early as the end of XIX century and

[244] *Marx K.,* The Class Struggle in France, 1848-1850 in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 160.
[245] *Marx K.,* The Class Struggle in France, 1848-1850 in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 124.
[246] *Marx K.,* The Class Struggle in France, 1848-1850 in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 125.
[247] *Marx K.,* The Class Struggle in France, 1848-1850 in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 126.
[248] *Marx K.,* The Civil War in France, in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 603.
[249] The importance of universal suffrage F. Engels underscored in view of the background of Post-Bismarck Germany, where the parliamentary route became the determining form for the organization of social democracy.
[250] *Engels F.,* Introduction, Civil War in France, in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 558.
[251] *Marx K.,* The Civil War in France, in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 599.
[252] *Widmer P.,* Switzerland as a Special Case, 2012, p. 111.
[253] *Haller W.,* The Swiss Constitution in a Comparative Context, 2012, p. 146.

the beginning of the XX century about the Swiss model of proportional representation as the tool of fairness for the exploited.[254] *Rajden Arsenidze* identified economic and political power and aspired to deprive the bourgeoisie of the latter power through the constitutional reforms.[255] Firstly, he considered the introduction of universal suffrage as necessary for this purpose.[256] *Rajden Arsenidze* thought that direct decision-making by the people was the ideal, but he realized, that when there are 'many people' (meaning many individuals), it is impossible. That is why he wrote: 'the only means of law-making [...] in our country is law-making through the representatives (deputies).'[257] However, he also admits that 'elected people, no matter which election procedure is employed, will never express the people's will perfectly'.[258] In his opinion this flaw was addressed by political parties, as the parties had their programs and the members of the parties acted under those programs, because they were accountable to their parties, while the non-partisan candidates were not accountable to anyone.[259]

The issue of the Parliament was considered by the Commission on 4 July 1919 and it was decided then, that the legislative body would be elected through a proportional system.[260] The proportional system was also supported by the Socialist Revolutionaries. *Samson Dadiani* wrote, 'Indeed, the whole nation will be represented in the Parliament, that is why proportional system is introduced for elections. The proportional system allows even the smallest groups to have their representatives in the Parliament'.[261] Thus, this primary feature of the direct democracy was approved without much strife. It eradicates the flaw emanated by the area and the number of population of modern states. These two factors do not allow the gathering of citizens, and the debates on general problems, therefore, it is necessary to have public attitudes accurately reflected in the representative body, so that the debates in the legislative body are approximated as much as possible to the debates that would have taken place in Agora. Regarding the Swiss perspective, the Swiss people acquired the right to constitutional referendum in

[254] *Jones S.,* Socialism in Georgian Colors: The European Road to Social Democracy 1883-1917, 2nd edition, 2018, p. 88.
[255] *Arsenidze R.,* Democratic Republic, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 45 (in Georgian).
[256] *Arsenidze R.,* Democratic Republic, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 45 (in Georgian).
[257] *Arsenidze R.,* Democratic Republic, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 52 (in Georgian).
[258] *Arsenidze R.,* Democratic Republic, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 52 (in Georgian).
[259] *Arsenidze R.,* Democratic Republic, in: 'Chronicles of Georgian Constitutionalism', 2016, pp. 52-53 (in Georgian).
[260] The Constitutional Commission, Wednesday, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 79-80 (in Georgian).
[261] *Dadiani S.,* Our Constitution – Viewed in the Light of the Right to People's State, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 264 (in Georgian).

1874, right of initiative in 1891 and finally the third momentum occurred in 1918, when the National Council was elected through the proportional system.[262] Georgia also held proportional elections in 1919.

The second issue involves the constituencies. The framers of the Constitution considered the possibilities to form single or many electoral districts as part of the proportional system. Theoretically, they were aware, that the single electoral district is better aligned with the idea of direct democracy, but they encountered the practical impediment related to the geographic location of the country, its mountainous places, and the presence of people of various nations and religions.[263] *Rajden Arsenidze* wrote in the commentary on the draft, that the system of elections should allow the opportunity of representing the interests of provinces, 'which can be achieved only through the division of the Republic into a number of electoral districts'.[264] The sample draft that he prepared was based on the same principle.[265] However, the issue of districts was ultimately left open in the Constitution.[266] Prior to that, the elections of the Constituent Assembly were held in a unified electoral district.

VII. THE CENTER AND THE LOCAL SELF-GOVERNMENT

1. THE EXECUTIVE BRANCH IN THE DEMOCRATIC REPUBLIC

The Democrats do not have right to sleep peacefully until solving the issue of the executive power. The solution of the issue of accountability still does not mean, that the cabinet is democratic. It is necessary to ascertain, whether it is the only the expression of the executive power.[267] The main feature distinguishing the parliamentary republic from the direct democracy is the issue of possessing the executive power. In view of *Noe Zhordania*, one of the characteristics of the parliamentary system is the ministry holding the executive power exclusively.[268] In this case, the government is so strong,

[262] *Widmer P.,* Switzerland as a Special Case, 2012, p. 285.
[263] The Parliament, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 808-809 (in Georgian).
[264] The Parliament, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 808-809 (in Georgian).
[265] The Parliament, Sample Draft of *R. Arsenidze,* The Constitution of the First Republic of Georgia (1921), Materials and Documents, p. 802 (in Georgian).
[266] 1921 Constitution of Georgia, 46, available at: <https://matsne.gov.ge/document/view/48 01430?public ation=0> (accessed 15.7.2021).
[267] *Zhordania N.*, Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 83 (in Georgian).
[268] *Zhordania N.*, Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 83 (in Georgian).

that it destroys all the democratic achievements.[269] In the opposite scenario, in a democratic state (direct democracy) this responsibility is allocated among the central and the local governments (this opinion is also shared by *Rajden Arsenidze*).[270] He brings the example of Switzerland, where the executive officials at the level of cantons are appointed either by the cantons or directly; there is also the 1793 model of France, where the administrators are elected by the people through their delegates.[271] *Noe Zhordania* believed, that Georgia had to choose the 'convent system', which means that self-governments are granted the power to appoint executive administrators and these officials are subordinated to the self-governments, while indirectly they are also subordinated to the respective minister (legality review).[272] During the discussion of the Constitution, *Rajden Arsenidze* emphasized the two-tiered nature of executive branch in his speech and declared that the executive power is based on the community.[273]

There is a bizarre provision on this issue in the Constitution, which states that in the matters of the government and the administration, self-governments are subordinated to the central bodies.[274] At first glance, it is strange, that a political union, that was as eager on the issues of self-government as the Social Democrats, included such a text in the Constitution. But in reality, they implied the competences of the central government under the term 'government and administration'. It is noted in the commentary on the draft, that self-government 'is only representative of the state in the matters of government and administration. There is no body, other than self-government that will execute the policy of the central government in the matters of government and administration.'[275] The acts of the government in these matters are compulsory for the local government.[276]

[269] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, pp. 85-86 (in Georgian).

[270] Discussion of the Constitution in the Constituent Assembly, Sitting of 17 December, Speech of *R. Arsenidze*, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 642 (in Georgian).

[271] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 84 (in Georgian).

[272] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 86 (in Georgian).

[273] Discussion of the Constitution in the Constituent Assembly, Sitting of 17 December, Speech of *R. Arsenidze*, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 645 (in Georgian).

[274] 1921 Constitution of Georgia, 46, available at: <https://matsne.gov.ge/document/view/48 01430?publication=0> (accessed 15.7.2021).

[275] The Local Self-Government, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 842 (in Georgian). Presumably, this document presents an explanatory note to the sample draft and it was authored by *M. Rusia.*

[276] The Local Self-Government, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 843 (in Georgian).

The commentary notes, that the unity of the central and local governments can be seen here, that should characterize government and administration.[277] Thus, the local bodies administer the enforcement of their own, as well as governmental decisions. Hence, it was included in the final text of the Constitution, that the local self-government is also local government body.[278]

Finally, *Noe Zhordania* framed the system in his speech, which was reflected in the Constitution and according to which the government governs 'less the people [self-government takes its place] and more the things'.[279] According to this vision, the management the of economy is the business of the Cabinet.[280]

2. LOCAL SELF-GOVERNMENT

The early theoreticians of democracy considered the small number of citizens as a necessary condition for democracy. *Aristotle* and *Jean-Jacques Rousseau* wrote, that it is necessary, that the citizens know each other, which fosters the decision-making based on reasoning and checks on each other.[281] The modern states need strong self-governments to address the flaw generated by the excess of population.

Karl Marx also favored self-governments. In the 'Eighteenth Brumaire' he distinguished between (1) common and (2) general interest. In his opinion, the former encourages the creativity of the members of the community, while the latter makes it meaningless and transforms the matters, that are usually the business of the community, into the object of governmental activities. It also leads to the centralization of the state, which should be demolished, according to him.[282] In another work, he welcomes the formation of the self-government of the producers instead of the central government.[283] According to *Karl Marx*, the communal system did not destroy the unity of the nation, but organized it instead.[284] 'This form of organization would return all the power to the organism

[277] The Local Self-Government, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 842-843 (in Georgian).
[278] 1921 Constitution of Georgia, Article 98, available at: <https://matsne.gov.ge/document/view/48 0143 0?publication=0> (accessed 15.7.2021).
[279] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 86 (in Georgian).
[280] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 86 (in Georgian).
[281] *Widmer P.,* Switzerland as a Special Case, 2012, p. 133.
[282] *Marx K.,* The Eighteenth Brumaire of Louis Bonaparte, in *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 369.
[283] *Marx K.,* The Civil War in France, in *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 600.
[284] *Marx K.,* The Civil War in France, in *Marx K., Engels F.,* Selected Works, Volume I, 1963, pp. 600-601.

of the society, which until now has been devoured by this parasitic outgrowth - the state, which is fed at the expense of the society and obstructs its free movement.'[285] *Karl Marx* based his argument firstly on the experience of France in 1848-1852 (the formation of a centralized apparatus of the modern state), while after 20 years he refers to the experience of the Paris Commune in his 'Civil War'. At the end, what was the common interest in France in 1848 and left more or less autonomy to the individual communities for management of their common interests, transformed into national-general interest along with centralization, that is governed from Paris and endangers democracy. The Paris Commune destroyed this centralization, but did not revert back to the pre-centralization setting; it creates something essentially new instead, which was perceived by *Karl Marx* as an unseen historical lesson and a new opportunity provided by the Commune.

Self-government was one of the main topics for the Georgian Social Democrats. They counted on the communal government called 'eroba', as the organization closest to the people. At the Second Congress, they supported the pluralist and decentralized model of Socialism.[286] In addition to the technical ease of the implementation of democratic processes in the small societies and the ideological grounds taken from *Karl Marx*, they were also able refer to their own experience as an important argument. It all started from the 'Republic of Guria', when at the outset of the XX century, the Gurian peasants declared disobedience to the Empire and started to build the society based on equality and freedom. The researcher of this issue, *Irakli Makharadze* wrote on the rich experience of self-government in the context of the Gurian revolutionary movement of 1902-1906.[287] At that time, there were multiple examples of self-government in other parts of Georgia as well, for example in Upper Imereti.[288] Later on, *Karl Kautsky* wrote about the period following the demolition of Tsarism: 'Revolution brought full self-government to the *erobas* and *uezds* [administrative subdivisions] of Georgia. [...] This is also true for the cooperative societies.'[289] At the time of the drafting of the Constitution, Georgia already had the experience, which *Wilhelm Haller* labelled as 'democracy lived through', that had to substitute the 'rigid legislative machine'.[290]

For the authors of the Constitution, the issue of local self-government was one of the main watersheds for the purpose of distinguishing beween the models of parliamentary

[285] *Marx K.,* The Civil War in France, in *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 602.
[286] *Jones S.,* Socialism in Georgian Colors: The European Road to Social Democracy 1883-1917, 2nd edition, 2018, p. 145.
[287] For details, see *Makharadze I.,* Republic of Guria, Gurian Peasant Movement 1902-1906, 2016, pp. 37, 61-62, 74-76, 98, 100, 105-106, 110-119, 202 (in Georgian).
[288] *Abdushelishvili S.,* In Memory of the Three Friends (*Guruli Z., Pkhaladze G.* and *Gaprindashvili G.*) in: *Guruli Z.,* In Memoriam, 2005, p. 97 (in Georgian).
[289] *Kautsky K.,* Georgia. Social-Democratic Republic of Peasants. Impressions and Observations, 2018, p. 94.
[290] *Haller W.,* The Swiss Constitution in a Comparative Context, 2012, p. 154.

and democratic republics. For example, in view of *Noe Zhordania*, in the parliamentary republic the bourgeoisie executed the whole power at the central level and could not tolerate the local freedom.[291] In non-intermediary democracy, the goal of distancing certain mechanisms from the control of parliamentary majority is served by the formation of self-governments. 'Here, the power is not consolidated in the center only, but is allocated between the center and the peripheries.'[292] As it was already mentioned above, according to this model, the center issues the laws, while the people, or the local governments controlled by the people enforce them. This meant a cabinet left without civil servants and a parliament limited by the people.[293]

This vision was directly transpired into the commentary of the sample draft, which presumably belongs to *Meliton Rusia*. He wrote that the draft negates the approach, where the state interests and the local needs are separated and where self-governments and central authorities are isolated from each other.[294] In his opinion, the draft did not distinguish between state affairs and self-government affairs. Moreover, in addition to managing the issues of local economy and administration, self-government 'is the only local body of the central government'.[295] *Rajden Arsenidze* paid particular attention to the issues of self-government and he elaborated thereon it in his address to the Constituent Assembly, where he emphasized the relationship between the self-government and the central government as one of the special features of the draft.[296] He named the system entrenched by the Constitution as a 'communal form of government', as 'the main foundation, which emanates all the creation and power of the executive work of the Republic - this is the local self-government, the local commune'.[297]

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[291] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T. (*eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, pp. 74-75 (in Georgian).

[292] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 75 (in Georgian).

[293] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 76 (in Georgian).

[294] The Local Self-Government, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 840 (in Georgian).

[295] The Local Self-Government, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 840 (in Georgian).

[296] Discussion of the Constitution in the Constituent Assembly, Sitting of 17 December, Speech of *R. Arsenidze*, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 641 (in Georgian).

[297] Discussion of the Constitution in the Constituent Assembly, Sitting of 17 December, Speech of *R. Arsenidze*, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 645 (in Georgian).

The principle of the democratic republic was also expressed in the regulation, according to which self-governments were elected by the people.[298] The supreme law favored the proportional system here again.[299]

The authors of the Constitution wanted to form a system similar to Switzerland, where the state edifice is based on the 'bottom-up' and not 'top-down' approach.[300] They understood, what *Paul Widmer* wrote later, that the direct democracy is strongest at the community level.[301] It was a deeply leftist idea, since the socialists 'always treated the idea of the concentration of powers with distrust'.[302]

VIII. THE JUDICIARY SYSTEM

After discussing the most complex and debatable topics above (the relationships between executive and legislative powers, as well as the link between central and local governments), we can now move on to the relatively less disputable and clearer issues. Naturally, omitting the topic of the judiciary would make the present analysis incomplete. It is true, that the authors of the Constitution did not encounter as many difficulties here as in resolution of above-mentioned problems, but this does not allow for the omission of this topic; on the contrary, it demonstrates that the authors of the Constitution unanimously followed the basic postulates here, in spite of the fact, that the *Marxist* critique of the liberal judiciary is as old as *Marxism* itself. *Karl Marx* perceives the corporation of judges as the 'fierce and fanatic defender of the old state' and opposes the principle of irremovability of the judges.[303] *Karl Marx* wrote, that after the overthrow of the king, it 'was restored several times in form of of these irremovable inquisitors of legality'.[304] Since the authors of the Georgian Constitution were building non-intermediary democracy, they believed in view of this goal, that 'wherever dominion belongs to the people and the people are the rulers and lords of their public life, they should enjoy the right to judge the acts of their members as well'.[305]

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[298] The Local Self-Government, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 841 (in Georgian).

[299] 1921 Constitution of Georgia, Article 101, available at: <https://matsne.gov.ge/document/view/4801430 ?publication=0> (accessed 15.7.2021).

[300] *Widmer P.,* Switzerland as a Special Case, 2012, pp. 151-152.

[301] *Widmer P.,* Switzerland as a Special Case, 2012, p. 161.

[302] *Widmer P.,* Switzerland as a Special Case, 2012, p. 74.

[303] *Marx K.,* The Class Struggle in France, 1848-1850 in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 177.

[304] *Marx K.,* The Class Struggle in France, 1848-1850 in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 177.

[305] The Judiciary, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 915. Presumably, this is an explanatory note to the draft (in Georgian).

The Georgia Social Democrats faced the following task: how to solve the issue of the judiciary in a way that would provide the country with a institution responsible for the dispensation of justice, that would not turn into into the bulwark of the bourgeoisie. In case of the executive and legislative powers. they took the well-travelled road to solve this problem. Similarly, to that, sharing of power was necessary here as well: part of the judges had to be elected by the people through their bodies, part of them would be appointed by the Parliament and as a result the judicial power would be allocated between the center and the people.[306] *Konstantine Mikeladze* stated that the principle of the election of jthe udges in a non-intermediary democracy was an established rule.[307] This approach was partially based on *Karl Marx*. While discussing the Paris Commune, he supported the direct election of judges (with the possibility of voting them out of office, as a mechanism of accountability for the citizens).[308]

The main weapons of the people were the election of judges for a fixed term and the jury trials.[309] *Karl Marx* favored the jury trials.[310] *Eric Lee* points out, that the latter was an indirect allusion to the Republic of Guria and the idea stemmed from that experience.[311]The practice of the peasant courts was indeed well-spread in Guria during 1903 -1905.[312] The author of the commentary on the draft prepared by the Constitutional Commission noted with regret, that public trials ('veche'[313]) were technically impossible to execute at that time. However, he offered the public the institution of the jury trials in order to solve this problem, as the jurors were representatives of the society.[314] At the same time, *Rajden Arsenidze* always openly demonstrated his support for the jury trials.[315]

The sitting of 25 October 1919 was devoted to the debates on the judiciary. The speaker was *Ioseb Baratashvili.* According to his draft, all the criminal cases had to be tried

[306] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 603-605 (in Georgian).

[307] *Mikeladze K.,* Constitution of the Democratic Republic and Parliamentary Republic, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 100 (in Georgian).

[308] *Marx K.,* The Class Struggle in France, 1848-1850 in: *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 600.

[309] Georgia, Its Territory and Population – History – Literature and Art – Political Situation, Georgian Association of the League of Nations, 1st edition (Paris), 1937, p. 88 (in Georgian).

[310] *Marx K.,* The Eighteenth Brumaire of Louis Bonaparte, in *Marx K., Engels F.,* Selected Works, Volume I, 1963, p. 365.

[311] *Lee E.,* The Experiment, The Forgotten Revolution of Georgia 1918-1921, 2018, p. 252.

[312] *Jones S.,* Socialism in Georgian Colors: The European Road to Social Democracy 1883-1917, 2nd edition, 2018, p. 172.

[313] 'Veche' was a Slavic version of popular – community assembly, which also had judicial functions.

[314] Judiciary, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 916 (in Georgian).

[315] *Arsenidze R.,* Democratic Republic, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 65 (in Georgian).

by the jurors and the chamber of criminal law had to be a (the institution of mediator judges was taken into consideration).[316] Prior to that, *Giorgi Naneishvili* thought that all the cases had to be tried by the jurors, however, they finally adopted the provision, according to which the jury trials were introduced for grave criminal cases, as well as for political and print-related crimes.[317] The Constitution contains exactly this version of the text.[318]

According to the approach of authors of the First Republic, the central government appointed the judges of the Supreme Court. However, it was decided at the end of the process to include this issue in the Constitution. Prior to that, at the sitting of 3 April 1920, it was decided, that the Senate would not be mentioned in the supreme law.[319] However, through the efforts of *Pavle Sakvarelidze* and *Akaki Chkhenkeli*, the provision about Senate was still included in the Constitution at the end.[320]

The work of the Constitutional Commission was marked by the efforts of the National Democratic Party to persuade the Social Democrats of the usefulness of the idea of judicial review,[321] but the members of the ruling party dismissed this opinion every time. *Rajden Arsenidze* defined the conceptual framework in his address to the Constituent Assembly, when he stated: 'The judiciary is not about control, it is only an enforcement body.'[322] It was clear, that in a direct democracy the judiciary would not have the role of balancing the elected parliament. The Social Democrats were here guided by the principles and the experience of non-intermediary democracy again. The Swiss judiciary did not have the authority of constitutional review either. *Paul Widmer* explains this, referring to the belief of the Swiss people, that 'no one other than the people, should be authorized to have the final say'.[323] This opinion was shared by the architects of the Georgian Constitution unconditionally. This conclusion is shared by

[316] The Constitutional Commission, 25 October, 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 139 (in Georgian).

[317] Journal of the Sitting of the Constitutional Commission, 8 January 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, p. 163 (in Georgian).

[318] 1921 Constitution of Georgia, Article 81, available at: <https://matsne.gov.ge/document/view/4801430?publication=0> (accessed 15.7.2021).

[319] Journal of the Sitting of the Constitutional Commission of the Constituent Assembly, 3 April 1920, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 364-367 (in Georgian).

[320] Journal of the Sitting of the Constitutional Commission of the Constituent Assembly, 20 May 1920, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 413-414 (in Georgian).

[321] Discussion of the Constitution in the Constituent Assembly, Sitting of 15 December, Speech of *K. Japaridze*, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 625 (in Georgian).

[322] Discussion of the Constitution in the Constituent Assembly, Sitting of 17 December, Speech of *R. Arsenidze*, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 640 (in Georgian).

[323] *Widmer P.,* Switzerland as a Special Case, 2012, pp. 158-159.

part of the researchers of the constitutional system of the First Republic. It is assumed by them, that the authors of the Georgian Draft Constitution dismissed the institution of constitutional review.[324]

Against this backdrop, the following opinion seems groundless: 'whereas there was an abundance of necessary principles and ideas for the constitutional review in the Constitution, it can be assumed, that the formation of such a constitutional body in the future or authorizing the common courts to carry out constitutional review would have been logical, if the existence of independent Georgia has lasted.'[325] Neither the discussions held on this topic, nor the balance of the political powers at that time allows to make such an inference. The situation could have certainly changed in the future, so that the Constitution could be amended and the Constitutional Court could be established. Even the constitutional order might have changed, but these are only speculations, which are not based on any solid ground or logical sequence of events, which would make such a development look inevitable.

IX. REFERENDUM AND PEOPLE'S INITIATIVE

1. GENERAL GROUNDS

The central idea of non-intermediary democracy is the direct implementation of the popular sovereignty. Everything stems from the people and is determined by the people, who are the source of power. However, to be translated into political action, this principle needs institutional tools. It needs such tools, which would allow the direct participation of the people in the execution of power.[326] This situation is complicated by the fact, that the territorial and numerical barriers do not allow a modern state to gather its citizens and adopt decisions in this way, due to which new methods needed to be found. People's initiative and referendum constitute such means.[327] *Paul Widmer* pointed out these two main mechanisms of citizen participation in state affairs in Switzerland.[328]

[324] *Gegenava D., Kantaria B., Tsanava L., Tevzadze T., Macharashvili Z., Javakhishvili P., Erkvania T., Papashvili T.,* Constitutional Law of Georgia, 2nd edition, 2016, p. 36; *Kinner R., Mirarch D.,* Common Democratic Objectives - The 1921 Constitution of Georgia and the 1874 Federal Constitution of the Swiss Confederation, in: *Ugrekhelidze M., Kantaria B.* (eds.), Constitutionalism Achievements and Challenges, 2019, p. 404 (in Georgian).

[325] *Papuashvili G.,* 1921 Constitution of the Democratic Republic of Georgia: Looking Back after Ninety Years, in: '1921 Constitution of the Democratic Republic of Georgia', 2nd edition, 2013, p. 31 (in Georgian).

[326] The Parliament, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 825 (in Georgian).

[327] Discussion of the Constitution in the Constituent Assembly, Sitting of 19 December, Speech of *A. Chkhenkeli,* The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 667 (in Georgian); Journal of the Sitting of the Constitutional Commission, 24 February 1919, Speech of *R. Arsenidze,* The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, pp. 192-193 (in Georgian).

[328] *Widmer P.,* Switzerland as a Special Case, 2012, p. 153.

However, the idea of a referendum at that point was not as self-evident, as it seems today. The modern liberal constitutionalism adopted it from the concept of a democratic state. This clearly demonstrates the drastic decisions made by Georgians in 1921 once again. Even in Switzerland the population of villages, craftsmen and workers achieved the referendum after the long struggle, first at the cantonal and later at the federal level.[329] In 1874, they were granted the right of a referendum and in 1891 – the right of popular initiative.[330] According to *Paul Widmer*, 'this is the most original novelty, which Switzerland created in politics'.[331] It was soon adopted by several states in USA[332] (first of which was South Dakota in 1898[333]).

The Georgian Social Democrats persistently underscored those mechanisms, which they considered to be the main tools of struggle against the bourgeoisie and a bourgeois state. It is interesting that *Noe Zhordania* was careful with the idea of a referendum at the beginning. He feared that opportunists would use it for their own interests and people would not be able to enjoy this good,[334] but soon afterwards he changed his position and supported the idea in his speech of 4 August 1918.[335] The decision of the head of the government was simplified by the French experience, that constituted a compromise allowed by the 1793 French Constitution and that determined the matters for referendum (either mandatory[336], or optional[337]), on one hand and the matters falling within the competence of the legislature, on the other.[338] *Rajden Arsenidze* also shared the idea of the mandatory referendum on certain issues[339] (who also supported the idea of the popular initiative[340]). Later, on 1 December 1920, *Noe Zhordania* only referred to the optional referendum before the Constituent Assembly. He agreed, that the people

[329] *Widmer P.,* Switzerland as a Special Case, 2012, p. 166.
[330] *Widmer P.,* Switzerland as a Special Case, 2012, p. 166; *Haller W.,* The Swiss Constitution in a Comparative Context, 2012, pp. 12-13.
[331] *Widmer P.,* Switzerland as a Special Case, 2012, p. 166.
[332] *Widmer P.,* Switzerland as a Special Case, 2012, p. 160.
[333] *Haller W.,* The Swiss Constitution in a Comparative Context, 2012, p. 2.
[334] Meeting of the Constitutional Commission, 11 June 1918, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 27 (in Georgian).
[335] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, pp. 81-82 (in Georgian).
[336] Mandatory referendum refers to the case, when it is mandatory to submit the law adopted by the Parliament to the people for their approval.
[337] Optional referendum refers to the case, when the law is submitted to the people for their approval, after it is required by a certain number of voters.
[338] *Zhordania N.,* Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 82 (in Georgian).
[339] *Arsenidze R.,* Democratic Republic, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 53 (in Georgian).
[340] *Arsenidze R.,* Democratic Republic, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 54 (in Georgian).

have the right to express their opinion on any law adopted by the Parliament - 'to either approve or disapprove it.'[341] He supported the right of popular initiative as well.[342] However, *Pavle Sakvarelidze*[343] did not support the idea of mandatory referendums, in contrast to the Socialist Federalist, *Ivane Cherkezishvili*.[344] The National Democratic Party was opposed to referendums.[345]

In spite of these debates, the optional referendum, as well as the popular initiative are entrenched in every draft, while the mandatory referendum was not included in any of them. The first sample draft stated, that 50 000 voters were entitled to a popular initiative and could demand optional referendum.[346] In the second sample draft, the number of voters necessary for the popular initiative was reduced to 5000, while the number of voters required for a referendum was reduced to 20 000[347] (there are identical numbers in the draft[348]). The dismissal of the idea of a mandatory referendum was explained in the commentary to the draft in this way: 'The Commission dismissed the idea of the referendum due to the fact, that if the draft laws are presented to the people for their approval very often, this leads to the overwhelm and the indifference on the part of the citizens.'[349] Finally, according to the Constitution, the signatures necessary for the initiative remained the same as in the draft, while the required number of voters for a referendum was increased up to 30000. The negation of the mandatory referendum was an important compromise. *Rajden Arsenidze* did not share the argument, that the mandatory referendum would protect the interests of people in a better way. In his words, if the people do not ask for a referendum, this means that they agree with the

[341] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 604 (in Georgian).
[342] Speech of Chairperson of the Government, *N. Zhordania,* Constituent Assembly, Sitting of 1 December, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 605 (in Georgian).
[343] *Sakvarelidze P.,* For the Constitution of Georgia, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 314 (in Georgian).
[344] Meeting of the Constitutional Commission, 11 June 1918, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 28 (in Georgian).
[345] Meeting of the Constitutional Commission, 11 June 1918, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 27 (in Georgian).
[346] The Parliament, Sample Draft of *R. Arsenidze,* The Constitution of the First Republic of Georgia (1921), Materials and Documents, p. 228 (in Georgian).
[347] The Parliament, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 804 (in Georgian).
[348] The Draft Constitution of Georgia adopted by the Constitutional Commission of the Constituent Assembly, May 1920, Article 71 and 72, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 439 (in Georgian).
[349] The Parliament, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 831 (in Georgian).

adopted law.[350] He omitted one important aspect here. It is all the issue of organization. The collection of several thousand signatures is an important impediment, which clearly makes the optional referendum a less effective mechanism, compared to the mandatory one. It was also a deviation from the Swiss model, as the Swiss Constitution explicitly enumerates the issues, on which it is mandatory to hold a referendum.[351]

In spite of this, the importance of non-mandatory referendums should not be diminished. *Wilhelm Haller* thought, that the introduction of this very mechanism had a fundamental influence on the political system in Switzerland.[352] The referendum coerced the governing class to take the popular opinion into account. The law-making procedure became an 'incessant process of seeking compromises' and fostered the development of Switzerland into a 'concordat democracy' (i.e. a 'consensus-oriented democracy').[353] The introduction of a referendum in Georgia was not only important for the reinforcement of the power of people; *Noe Zhordania* considered that it carried great importance for the amplification of the unity of the people and the state. It tied the society and the Parliament and transformed them into one organism.[354] The members of the Parliament always had to consider the factor, that the laws adopted by them could be tested through the referendum, which would force them to work in a careful and diligent manner.[355] Referendum and people's initiative are considered as tools of the involvement and the activation of the society by *Wilhelm Haller*, since 'the elections are a passive opportunity and allow for a participation only, when the citizens are called upon'.[356] He also shared the arguments of the accountability of the rulers and the balancing of them by the people.[357]

2. THE CONSTITUTIONAL REFERENDUM AND THE CONSTITUENT POWER

Popular sovereignty, the power of people and non-intermediary democracy are closely linked to the rules of the revision of the Constitution. *Noe Zhordania* viewed the constitutional referendum (ratification) as the only mechanism for the limitation of the

[350] The Parliament, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 831 (in Georgian).
[351] *Haller W.*, The Swiss Constitution in a Comparative Context, 2012, p. 125.
[352] *Haller W.*, The Swiss Constitution in a Comparative Context, 2012, p. 128.
[353] *Haller W.*, The Swiss Constitution in a Comparative Context, 2012, p. 128.
[354] *Zhordania N.*, Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, pp. 82-93 (in Georgian).
[355] *Zhordania N.*, Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, pp. 82-93 (in Georgian).
[356] *Haller W.*, The Swiss Constitution in a Comparative Context, 2012, p. 33.
[357] *Haller W.*, The Swiss Constitution in a Comparative Context, 2012, p. 4.

power of the Constituent Assembly and supported it.[358] *Pavle Sakvarelidze* was eagerly advocating the idea of constitutional referendum.[359] *Aleksandre Mdivani* was even more radical in framing the issue and stated, that 'to put the revision of the Constitution in the hands of people, is the last step of people's dominion'.[360]

The debates on the revision of the Constitution were held at the sitting of the Commission of 5 November 1919.[361] *Giorgi Naneishvili* prepared the sample draft, according to which one fourth of the deputies and 50 000 voters enjoyed the right of initiative.[362] *Giorgi Gvazava* asserted that 20 000 voters should be granted the right of initiative; he also supported the referendums.[363] *Mukhran Khocholava* also thought that the proposed number was too large; at the same time he believed, that the Parliament had to make take its decisions by three-fourths majority of the votes of its members.[364] In his opinion, the initiative, dismissed by the Parliament, could still be placed put to the vote in the referendum; if the people would support it and the Parliament would oppose it, the Parliament had to be dissolved.[365] *Meliton Rusia* supported the idea of the two-thirds majority of the votes.[366] In view of the Socialist Revolutionary *Ivane Gobechia*, the right of initiative should be granted to 20 000 - 25 000 people. He supported *Mukhran Khocholava* and believed, that the initiative could be placed to vote in the referendum even if the Parliament would dismiss it.[367] *Giorgi Gvazava* took a different approach

[358] *Zhordania N.*, Social Democracy and Organization of the Georgian State, 4 August 1918, in: *Jgerenaia E., Kenchoshvili T.* (eds.), The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, pp. 81-82 (in Georgian).

[359] Meeting of the Constitutional Commission, 11 June 1918, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume I, 2015, p. 27 (in Georgian).

[360] *Mdivani A.*, Government and Its Accountability, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 365 (in Georgian).

[361] Journal of the Sitting of the Constitutional Commission of the Constituent Assembly, 5 November 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 156 (in Georgian).

[362] Journal of the Sitting of the Constitutional Commission of the Constituent Assembly, 5 November 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 151-152 (in Georgian).

[363] Journal of the Sitting of the Constitutional Commission of the Constituent Assembly, 5 November 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 152-153 (in Georgian).

[364] Journal of the Sitting of the Constitutional Commission of the Constituent Assembly, 5 November 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 153 (in Georgian).

[365] Journal of the Sitting of the Constitutional Commission of the Constituent Assembly, 5 November 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 154 (in Georgian).

[366] Journal of the Sitting of the Constitutional Commission of the Constituent Assembly, 5 November 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 154 (in Georgian).

[367] Journal of the Sitting of the Constitutional Commission of the Constituent Assembly, 5 November 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, pp. 154-

to this issue: 'If the Parliament does not approve this initiative, it disappears and does not go anywhere; only if the Parliament approves it, will it be submitted to the people through a referendum. If the voters' initiative enters the Parliament, the Parliament will only confirm the receipt of the given proposal (initiative) regarding the revision of the Constitution and transfer it to the people through the referendum. If the people support it – the Parliament will start to draft the respective law.'[368] The Commission failed to make a decision at that sitting and they postponed the debates on this issue until the next meeting. On November 26, the debates on the revision of the Constitution were resumed. Finally, during the voting two texts (25 000 - initiated by *Giorgi Gvazava* and 50000 – initiated by *Giorgi Naneishvili*) ended in a tie. The position of the chairman, *Rajden Arsenidze* appeared to be decisive, as he supported the latter version (he proposed the requirement of 100 000 voters, but his initiative did not pass).[369] *Pavle Sakvarelidze* proposed the idea to grant the right of initiative to the majority of *erobas* and self-governments of cities,[370] however, this was not included in the final version.

The Constitution ultimately granted the right of initiatives to 50% +1 deputies and 50 000 voters.[371] In order to adopt the constitutional amendments, the Constitution required the votes of two-thirds of the members of the Parliament and a referendum.[372]

X. CONCLUSION

If the reader does not take the work of adjustment into account, that was carried out by the authors of the Georgian Constitution in the process of drafting the document, it may seem to them that the Georgian Social Democrats were utopians after reading of the Constitution of 21 February 1921. In view of their environment, they had to give up not only their ideal of a socialist republic, but they were also compelled to adopt a democratic model. In order to conceptualize these changes as a transitory model on the way to a socialist republic, there were met with some drawbacks (for instance an

155 (in Georgian).

[368] Journal of the Sitting of the Constitutional Commission of the Constituent Assembly, 5 November 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 155 (in Georgian).

[369] Journal of the Sitting of the Constitutional Commission of the Constituent Assembly, 5 November 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 159 (in Georgian).

[370] Journal of the Sitting of the Constitutional Commission of the Constituent Assembly, 5 November 1919, The Constitution of the First Republic of Georgia (1921), Materials and Documents, Volume II, p. 160 (in Georgian).

[371] 1921 Constitution of Georgia, Article 145, available at: <https://matsne.gov.ge/document/view/4801430?publication=0> (accessed 15.7.2021).

[372] 1921 Constitution of Georgia, Article 147, available at: <https://matsne.gov.ge/document/view/4801430?publication=0> (accessed 15.7.2021).

obligatory referendum or the status of the Chairman of the Government), however, these changes often constituted an improvement of the model and lead to the strengthening of the popular control over the public bodies. Among these types of solutions, the individual responsibility of ministers is particularly noteworthy. They integrated the institution of non-confidence, a characteristic for the bourgeois parliamentarism, within the democratic system so that, the model did not get closer to the liberal form of government; it was a step away from it instead. This paradoxical twist of arguments often confuses constitutionalists until now and leads to the false classifications, such as the consideration of the political order of the First Republic as a parliamentary system or its placing between the models of direct democracy and parliamentarism, whereas it is unequivocal, that the Constitution made the choice in favor of the former. In addition to what was stated above, it masterfully handled the political and legal problems, such as relationship between the local and central governments, the institution of the head of state, the issue of representation, the electoral system and the power of parliament, the justice system and constitutional review.

The boldness of the Georgian Social-Democrats and other authors of the Constitution, when they sat at the table for the drafting of the supreme law more than century ago is blinding. Their enthusiasm to form the most democratic political union in the world at that time naturally fills the readers with respect. Their constitutional steps were equally determined by the experience of mankind and its critique. They managed to found the previously untested tenets on the solid ground of comparativism. They based these novelties and modifications on the deep analysis of the context and tried to fit theoretical models to it. The viability of the system was confirmed by the three-year long experience. However, the most exciting fact in this history is the fatalism, which stirs all the truly democratic minds.

The authors of the first Georgian Constitution considered the developed model to be a transitory document. They thought that in the future, it would be substituted by the socialist order. The supreme law was drafted with the sentiment, that sooner or later, and the sooner the better, it would be invalidated. Another paradox haunting the document, is that the success of the experiment was determined by its destruction. It seems, that it was born with the stopwatch on and already close to its end. The time whirled it towards the revolution as the storm in *Paul Klee's* 'Angelus Novus' in the interpretation of *Walter Benjamin*.[373] They were aware of the fact that the document drafted by them was doomed for death, but they still worked on it with so much determination and diligence, that even for a reader today it is hard not to get emotional. It takes a strong will to realize, that the thing that you are creating is doomed to perish, and to maintain the motivation, unaffected by this realization. The Georgian Social Democrats focused all their efforts

[373] *Benjamin W.,* On the Concept of History, The Work of Art in the Age of Mechanical Reproduction, On the Concept of History, 2008, p. 99.

to ensure that the temporary document would not transform into a permanent project of the development of the country by error.

It is hard to say, which turn the events would have taken, if the Soviet occupation of 25 February 1921 had not ended the independence of Georgia. It is also hard to say, how the document would have worked after 70 years, had the words of the Act of Independence of Georgia of 9 April 1991 still had legal force. We can only look with melancholy at the bits, which have survived from the text of the first Constitution and are spread throughout the neo-liberal dessert of the current Constitution.[374] To use the *Jorge Luis Borges* metaphor, from the compilation entitled 'Museum' – a very precise title in our context: under the current order, these bits can only serve the marginal function of accommodating those that are ostracized from the societal system.

[374] *Borges J. L.*, On Exactitude in Science, 'Stories', 2012, p. 351.

Paata Javakhishvili[*]

THE ISSUE OF UNAMENDABLE NORM IN THE FIRST CONSTITUTION OF GEORGIA

ABSTRACT

The 1918 Act of Independence of Georgia is the first act of constitutional significance, which defined the Democratic Republic as a form of the political structure in Georgia. The main factors that led to the change in Georgia's traditional form of monarchical government were the fear of restoring the monarchy itself and the need to shift to a form of state governance that would establish the principle of public representation in the governmental system and would ensure the realization of the idea that the people are the government's source of authority. It is noteworthy that this choice was solid and acknowledged by the political authorities, which is confirmed by the recognition and assurance of the Democratic Republic as an immutable form of the Georgian political structure in the 1921 Constitution of Georgia.

The purpose of this article is to discuss the form of the political structure of the state defined by the First Constitution of Georgia, to assess of the major normative features of the constitutional norm and to analyze of the determinants of the establishment of the Democratic Republic as a permanent and an immutable norm of the Constitution. The paper discusses the political and legal preconditions, goals, and the legal nature of the establishment of a democratic republic as an immutable norm. As regards to the immutable norms a parallel is drawn between modern states' constitutions and the corresponding conclusions are presented in article.

I. INTRODUCTION

100 years have passed since the adoption of the First Constitution of the Democratic Republic of Georgia. Following the passage of time, the democratic values enshrined in the Constitution still astonish us. In this respect, the numerous important institutions established in the Constitution did not just correspond to the most modern ideas of constitutionalism, but they were also in line with the progressive vision of the 'founders' and the constitutional implementation of such vision of statehood is compatible with modern democratic values. Humanism, the depth of the conception of the state and an advanced legal culture are the main features by which the text of the Constitution is imbued.

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In a contemporary democratic society, one of the central issues is the protection of constitutional values. Along with the protection of the state governance system and fundamental human rights, it is crucial to determine the state's political structure and the tendencies towards the development of the society. In view of this, attention is drawn to the 1918 Act of Independence and the subsequent establishment of the form of the political structure in the Constitution of 21 February 1921. This was is one of the issues on which the political spectrum of that period had a clear and solid common position, despites its ideological differences, however, this was not only a matter of choice, but also a result of certain 'fear and recognition'[1].

The purpose of this paper is to discuss the form of the political structure of the state defined by First Constitution of Georgia, to assess the major normative features of the constitutional norm, to analyze the factors of the establishment of the 'Democratic Republic' as a 'permanent and immutable' norm of the Constitution. Obviously, the content of the research topic requires the analysis of historical sources, it also calls for a systematic and comparative legal review of the norms of Independence Act of Georgia. For this reason, the research will be conducted through historical, comparative, and teleological methods.

II. THE ISSUE OF POLITICAL STRUCTURE IN GEORGIA'S FOUNDING ACTS

In Georgia, traditionally, a form of monarchical government was established, however, the legal and historical sources confirm that even in a period of feudalism, the king's power never reached such a degree that would place a form of Georgia's government in the category of absolute monarchy.[2] In such a case, the transition to a republican system can be considered as the logical continuation of state organization. The Democratic Republic as a form of political structure was determined by the Act of Independence of Georgia, which is considered as the first Constitutional Act in the history of Georgia's Independence.[3]

Despite the fact that the 1918 Act of Independence included norms of declaratory nature, it still contains more norms with normative significance,[4] for this reason, it was indeed an effective document.[5] It conveyed basic ideas, the implementation of

[1] For the term 'fear and recognition', see *Sajó A.* [*Ninidze T.* ed.], Self-Restraint of Government, Introduction to Constitutionalism, 2003 (in Georgian).

[2] *Kantaria B.,* The Issue of Immutability of the Form of Government in the First Constitution of Georgia, in: 'At the Origins of Georgian Constitutionalism - 90th Anniversary of the Constitution of Georgia of 1921', 2011, p. 63 (in Georgian).

[3] *Shengelia R.* (ed.), Basics of Georgian Law, 2004, p. 70 (in Georgian).

[4] *Tsnobiladze P.,* Constitutional Law of Georgia, Volume I, 2005, p. 94 (in Georgian).

[5] *Gegenava D.* (ed.), Introduction to the Constitutional Law of Georgia, 2019, p. 36 (in Georgian).

which was planned for the future by the Georgian society. By the adoption of the Act of Independence, the National Council in fact 'focused on the future of the Democratic Republic of Georgia'.[6] Among the key issues addressed by the 1918 Act, special attention was given to the form of governance, and the proclamation of the Democratic Republic as a form of political structure.[7]

On February 21, 1921, the Constituent Assembly of Georgia unanimously adopted the Constitution of Georgia.[8] For modern civilization its adoption relates to quite a critical and challenging period[9] and intended not only a creation of a basic law for the Democratic Republic of Georgia but also 'a democratic choice for the European and the civilized world made by Georgia'.[10] Besides, during the drafting process of the 1921 Constitution of Georgia 'the historically shaped psyche, existence, morals and customs, national composition of the Georgian people' should have been taken into account.'[11]

Due to the existing geopolitical situation created by the Constituent Assembly of Georgia did not manage to complete the detailed discussion of all structural elements of the Constitution[12] and the Constitution was adopted expeditiously,[13] however, this process was preceded by its three-year-long detailed review of two Commissions. The effectiveness of this process is evidenced by the institutions given in the Constitution, which were the most progressive ideas in the state life of the modern world at that time. Precious are the achievements of those who were personally involved in the drafting process of the Constitution. For instance, it is well-known that *Pavle Sakvarelidze* was constantly publishing commentaries on its provisions, and informing the public about their content, while working on the Constitution's draft project.[14] However, in

[6] *Kverenchkhiladze G.,* Executive Power and the 1921 Constitution of Georgia, in: 'At the Origins of Georgian Constitutionalism - 90th Anniversary of the Constitution of Georgia of 1921', 2011, p. 166 (in Georgian).

[7] Article 2 of the Act of Independence of Georgia declared on May 26, 1918, Article 2, available at: <https://matsne.gov.ge/ka/document/view/4801451?publication=0> (15.6.2021).

[8] *Matsaberidze M.,* Elaboration and adoption of the Constitution of Georgia of 1921, in: 'At the Origins of Georgian Constitutionalism - 90th Anniversary of the Constitution of Georgia of 1921', 2011, p. 36 (in Georgian).

[9] *Matsaberidze M.,* Elaboration and adoption of the Constitution of Georgia of 1921, in: 'At the Origins of Georgian Constitutionalism - 90th Anniversary of the Constitution of Georgia of 1921', 2011, p. 22 (in Georgian).

[10] *Demetrashvili A.,* The Constitution of Georgia of February 21, 1921, From the 2011 revision, in: 'At the Origins of Georgian Constitutionalism - 90th Anniversary of the Constitution of Georgia of 1921', 2011, p. 10 (in Georgian).

[11] *Gurgenidze E.* (ed.), Collection of Legal Acts of the Democratic Republic of Georgia (1918-1921), 1990 (in Georgian).

[12] *Demetrashvili A., Kobakhidze I.,* Constitutional Law, 2010, p. 51 (in Georgian).

[13] *Gegenava D., Papashvili T.,* Georgian Model of Revision of the Constitution - Gaps in Normative Regulation and Perspective, 2015, p. 14 (in Georgian).

[14] *Matsaberidze M.,* Elaboration and Adoption of the Constitution of Georgia of 1921, in: 'At the Origins of Georgian Constitutionalism - 90th Anniversary of the Constitution of Georgia of 1921', 2011, p. 36 (in Georgian).

the scientific literature, the realization and the constitutionalization of a human as a basic social value is rightfully considered to be one of the main accomplishments of the founders of the 1921 Constitution.[15] In this regard, it is 'an Act of significantly higher value than simply the historical legacy of the recent past.'[16]

According to the first article of the 1921 Constitution of Georgia, the Democratic Republic of Georgia was defined as a form of political structure. However, compared to Article 2 of the 1918 Act of independence of Georgia, the wording of the norm was much clearer and more unequivocal – the Democratic Republic was established as a form of 'immutable and permanent' political structure, which is the only matter of the 1921 Georgia's Constitution that is not subject to revision. Moreover, the 1921 Constitution did not just consider the Democratic Republic to be an immutable form of political structure, but it also prevented the possibility of initiating a constitutional law regarding the abolition of the Democratic Republic form of government.[17] This again emphasizes the intentions of 'founders' of the Constitution and the special importance of this issue for them.

III. THE ISSUE OF POLITICAL STRUCTURE IN THE AGENDA OF POLITICAL PARTIES

Contrary to the radical discussion on various issues typical to Georgian society, the immutability issue of the form of the political structure in the 1921 Constitution is the result of a common political consensus.[18] The proclamation of the Democratic Republic in Georgia was supported by the most powerful political entities in the political landscape of that time: Social Democrats and National Democrats.[19] This was due to various factors, including the fear of restoration of the monarchy. In the work and memoirs of the public figures of that period a positive attitude towards the republican government and the democratic republic in general is clearly demonstrated. On the reverse, the monarchy is equated with a form of government that absolutely restricts the freedom of the people and peoples' participation in 'state affairs'. Thus, the decision to choose

[15] *Demetrashvili A., Kobakhidze I.,* Constitutional Law, 2010, p. 52 (in Georgian).
[16] *Davituri G.,* Mechanism of Revision of the Constitution of Georgia of 1921 - Perspectives of Constitutional Reform, in: 'Democratic Republic of Georgia and the Constitution of 1921', 2013, p. 147 (in Georgian).
[17] 1921 Constitution of Georgia, Article 148, available at: <https://matsne.gov.ge/document/view/4801430?publication=0> (accessed 15.7.2021).
[18] *Matsaberidze M.,* Elaboration and Adoption of the 1921 Constitution of Georgia, in: 'At the Origins of Georgian Constitutionalism - 90th Anniversary of the Constitution of Georgia of 1921', 2011, pp. 37-38 (in Georgian).
[19] *Matsaberidze M.,* Elaboration and Adoption of the 1921 Constitution of Georgia, in: 'At the Origins of Georgian Constitutionalism - 90th Anniversary of the Constitution of Georgia of 1921', 2011, pp. 37-38 (in Georgian).

a democratic republic form was not a coincidence. The founders of the Constitution confronted the idea of monarchy 'not just with the concept of 'republic', but with that of a democratic republic' - a form of the political structure where the government belongs to the majority elected by the people.'[20]

Even though the vision of the Constituent Assembly members intended to integrate democratic values into the society, there was an option established in legal literature, that the excessive valuation of republican ideas, that were in fact in imbued with the fear of restoring the monarchist form of government, led to the sacrifice of a number of constitutional principles, the absence of which could jeopardize the stable functioning of the state,[21] for example, the absence of the institution of the head of state.

If we consider this in more detail, it is obvious that for the Social Democrats the issue of the restoration of the monarchy was completely unacceptable.[22] Furthermore, the assurance of the permanent republican government at the highest legal level was exceptionally important for them.[23] In general, the position of the Social Democrats was of particular significance, as precisely this political power held the qualified majority of the mandates of the Constituent Assembly. It should be noted that the Social Democrats, who were originally formed as an indivisible part of the corresponding political party in Russia, completely changed their political course after the Declaration of Independence and started to perform an active role in the presentation and implementation of national ideas.[24] Due to fearing the monarchy restoration, the social democrats were the ones that raised the issue in the Constitutional Commission to have an independent article in the Constitution regarding Georgia's political structure and the establishment of Georgia as a Democratic Republic.[25]

In legal literature, the settlement of the issue of the political structure in the 1921 Constitution is linked with two major factors: The national roots of the Democratic Republic and the fear of having the monarchical government restored. However, it is necessary to clarify the intention of the 'founders' from the beginning, who desired for

[20] *Kantaria B.,* The Issue of Immutability of the Form of Government in the First Constitution of Georgia, in: 'At the Origins of Georgian Constitutionalism - 90th Anniversary of the Constitution of Georgia of 1921', 2011, p. 64 (in Georgian).

[21] *Davituri G.,* Mechanism of Revision of the Constitution of Georgia of 1921 - Perspectives of Constitutional Reform, in: 'Democratic Republic of Georgia and the Constitution of 1921', 2013, p. 157 (in Georgian).

[22] *Khetsuriani J.,* Forms of State Governance and Prospects for the Restoration of Monarchy in Georgia, in: 'Research in Georgian Jurisprudence', 2011, p. 35 (in Georgian).

[23] *Gegenava D.* (ed.), Introduction to the Constitutional Law of Georgia, 2019, p. 37 (in Georgian).

[24] *Kemamzade F.* [*Kantaria K. tran., Mamulia G.* ed.], Battle for the Transcaucasia 1917-1921, 2016, p. 230 (in Georgian).

[25] *Kantaria B.,* The Issue of Immutability of the Form of Government in the First Constitution of Georgia, in: 'At the Origins of Georgian Constitutionalism - 90th Anniversary of the Constitution of Georgia of 1921', 2011, p. 66 (in Georgian).

Georgia to have a basic law that would enshrine the values typical for a modern civilized world. In this regard, their aspiration to incorporate the progressive norms from the basic law of European countries is important. With reference to the immutability of the form of political structure, the founders of the Constitution were invoking the most essential documents of that time as an argument – the Constitution of France of 1875 and the Basic Law of Portugal of 1917.[26] Nevertheless, the Georgian Constitution and the attitude of its founders was significantly by the constitutional amendments of 1875 French Constitution, executed in 1984 which led to the establishment of the republican form of government as an immutable form of government in France.[27]

It should be emphasized that the attitude towards political structure was so evident that the important institutions that were typical for modern life would be excluded from the form of classical republican government. For instance, in view of *Rajden Arsenidze*, a form of republican government should have been established in Georgia without having an institution of a president.[28] He believed that 'the executive power in the republican system is at the disposal of the president, and this provides him with the same rights that the king is given in monarchy.[29] From his perspective, the republican form of government belonged to such political regimes where the king's power was abolished, and the entire administration was transferred in the hands of the persons elected by the people.'[30] A supporter of the republican government form was the National Democrat *Giorgi Gvazava*, who considered democracy to be in accordance with the contemporary 'cultural level' and as a key feature of the progressive states.[31] It's noteworthy to mention the opinion of the invited member of the Constitutional Commission – a famous lawyer, *Konstantine Mikeladze*, who believed that 'the republic is the only form of state governance that provides a broad ground for the realization and the enhancement of the natural rights of the people.'[32]

The discussed opinions certainly demonstrate not just the position of particular members of the society towards the form of republic government, but they also formed the base

[26] Constitution of the Democratic Republic of Georgia of 1921, Constitutional Court of Georgia, 2013, 2nd edition, p. 16 (in Georgian),

[27] *Kantaria B.,* The Issue of Immutability of the Form of Government in the First Constitution of Georgia, in: 'At the Origins of Georgian Constitutionalism - 90th Anniversary of the Constitution of Georgia of 1921', 2011, p. 67 (in Georgian).

[28] *Arsenidze R.,* Democratic Republic, Classics of Georgian Law, 2nd edition, 2014, p. 16 (in Georgian).

[29] *Arsenidze R.,* Democratic Republic, Classics of Georgian Law, 2nd edition, 2014, p. 17 (in Georgian).

[30] *Arsenidze R.,* Democratic Republic, Classics of Georgian Law, 2nd edition, 2014, p. 17 (in Georgian).

[31] *Gvazava G.,* Basic Principles of Constitutional Law, Classics of Georgian Law, 2014, p. 27 (in Georgian); *Gvazava G.,* Speech at the Constituent Assembly, in: 'Chronicles of Georgian Constitutionalism', 2016, p. 130 (in Georgian).

[32] *Mikeladze K.,* The Constitution of a Democratic State and a Parliamentary Republic (Some Considerations in the Draft Process of the Constitution of Georgia), in: 'Chronicles of Georgian Constitutionalism', 2016, p. 70 (in Georgian).

for the consensus of the Georgian political parties of that time on issues of the formation of the political structure. During the drafting process of the future constitution, the only remaining issue that needed to be resolved was concerning the determination of 'permanency' and 'immutability' of the political structure in the basic law of the country.[33]

However, a question arising related to this matter, was the actual 'danger' of the possible restoration of monarchical government. The discussion of this question in a political context can only be based on theoretical assumptions and does not represent the purpose of the present study. Legally speaking, it is more important to refer to immutability of the government form at the constitutional level and to determine whether the form of a political structure ensured the legal possibility to change it. In this regard, the existing practices on the permanency of constitutional norms are important.

IV. DO 'PERMANENT' CONSTITUTIONAL NORMS GUARANTEE 'IMMUTABILITY'?

A small number of modern states constitutionally enforce 'immutable' norms. For instance, according to the Italian[34] and French[35] Constitutions, a form of republic government cannot be subject of a constitutional revision. The German Basic Law defines federalism as a permanent and immutable form of territorial organization.[36] However, this is considered as old element of constitutionalism, while the modern constitutions support the establishment of a rigid mechanisms of constitutional revision for the purpose of upholding certain norms.[37] The practice of applying permanent norms is intended to protect the Constitution from unjustifiable amendments,[38] but rather than imposing legal restrictions on the legislature by the Constitution, it has merely a declarative purpose .[39] The various issues and their permanency that is ensured by the Constitution, are diverse and linked to the form of the government, territorial organization, the standard of protection of basic human rights and etc. The Venice

[33] *Kantaria B.,* The Issue of Immutability of the Form of Government in the First Constitution of Georgia, in: 'At the Origins of Georgian Constitutionalism - 90th Anniversary of the Constitution of Georgia of 1921', 2011, p. 65 (in Georgian).

[34] Constitution of the Italian Republic, 1947, Article 139, available at: <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf> (accessed 15.7.2021).

[35] Constitution of France, 1958, Article 89, available at: <https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf> (accessed 15.7.2021).

[36] Basic Law for the Federal Republic of Germany, 1949, Article 79, para. 3, available at: <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf> (accessed 15.7.2021).

[37] Report on Constitutional Amendment, European Commission for Democracy Through Law (Venice Commission), CDL-AD (2010)001, 2009, para. 203, available at: <https://www.venice.coe.int/webforms/documents/?pdf=cdl-ad(2010)001-e> (accessed 15.7.2021).

[38] *Barak A.,* Unconstitutional Constitutional Amendments, Israel Law Review 44, 2011, p. 333.

[39] Report on Constitutional Amendment, European Commission for Democracy Through Law (Venice Commission), CDL-AD (2010)001, 2009, para. 203, available at: <https://www.venice.coe.int/webforms/documents/?pdf=cdl-ad(2010)001-e> (accessed 15.7.2021).

Commission distinguishes between 'immutable' norms and principles, when considering such 'permanent' norms. In the first case, it's completely impossible to have amendments in the Constitution that provides any kind of change to 'immutable' provision, while the practice of 'immutability' of constitutional principles allows this only to an extent that ensures that basic the elements of a particular principle are preserved.[40] The concepts subject to such amendments are 'republicanism', 'sovereignty', 'democracy', 'basic human rights' and etc.

The issue of the form of the political structure defined by the 1921 Georgian Constitution constitutes such a constitutional principle that could have been subject to amendments, yet, only to a certain extent. The clause established in article 148 of Georgian Constitution, which determined thar 'abolition of the form of Government of the Democratic Republic of Georgia may not be the subject of proposal for a revision of the Constitution', did not exclude the possibility to initiate a corresponding amendment regarding the form of government in the Constitution. The given norm of the Constitution only limited the possibility of initiating certain radical amendments that would change the notion of a Democratic Republic. In particular, this constitutional norm excluded the revisal of constitution in a way that would aim at the establishment of a form of monarchical government. However, there was still a possibility of certain constitutional amendments, that would not modify the content of the term 'republican'.

In the legal literature, the 'immutable' norms of the constitution are related to another important issue- the determination of a constitutionality of constitutional law. The existence of 'permanent' norms in the Constitution leads to a certain type of hierarchization of constitutional norms,[41] which provides an opportunity to assess the compatibility of constitutional amendments with the Constitution. For instance, in the German basic law, human dignity and democracy are values that are of special importance, therefore, it is possible to review the constitutionality of any Act that are incompatible with them, including that of a constitutional law,[42] while the Constitutional Court of Georgia has refused to exercise this power in several cases on the grounds that a constitutional law, once it is adopted, becomes an integral part of the Constitution and that constitutional control over it is beyond the powers of the Constitutional Court.[43] Considering that this power belongs to the sphere of constitutional control and that the

[40] Report on Constitutional Amendment, European Commission for Democracy Through Law (Venice Commission), CDL-AD (2010)001, 2009, para. 204, available at: <https://www.venice.coe.int/webforms/documents/?pdf=cdl-ad(2010)001-e> (accessed 15.7.2021).

[41] *Eremadze K.,* Perspectives on the Constitutional Review of Constitutional Law, in: 'Rule of Human Rights and Law', 2013, p. 75 (in Georgian).

[42] *Gegenava D., Papashvili T.,* Georgian Model of Revision of the Constitution - Gaps in Normative Regulation and Perspective, 2015, p. 62 (in Georgian).

[43] *Khetsuriani J.,* The Authority of Georgian Constitutional Court, 2020, p. 99 (in Georgian).

First Constitution did not provide for the a body performing a constitutional review, there was also no mechanisms to protect the Constitution from such amendments.[44]

And finally, it needs to be determined, whether there was an unavoidable need of having a reference regarding the Democratic Republic as a form of 'immutable' and 'permanent' political structure in the 1921 Constitution? Firstly, it must be stressed out that the idea of republicanism given in the constitution is discussed simultaneously with the principle of democracy. In this regard, the 1921 Constitution not only established a republican form of governance, but it also introduced the principle of democracy as a political regime. Given the content and the general spirit of the 1921 Constitution, which was based entirely on these principles, it is obvious that the reference to a Democratic Republic, and especially its declaration of a 'permanent and immutable' form of political structure was more declarative than constitutional. Thus, a change of this principle would have constituted not only a change of the norm, but it would also have had a significant impact on the content of the Constitution as a whole and would have prevented the idea of having a sovereign and democratic state.[45]

V. CONCLUSION

The 1918 Act of Independence of Georgia established the Democratic Republic as a form of the political structure in Georgia, and through the 1921 Constitution, it became an 'immutable and permanent' norm. The main factor influencing this choice was the fear of the restoration of the monarchy in Georgia, which indeed determined the permanency of the idea of republicanism in the First Constitution of Georgia. However, the analysis of the historic sources has revealed that the decision of the Georgian people did not result from this factor solely, and the choice was been intentionally made on a particular form of the political structure of the state in which people are the source of state power. It is noteworthy, that there was a complete consensus among the political spectrum on this issue, which was of crucial importance for the introduction of republicanism and the constitutional principles of democracy.

The establishment of the Democratic Republic as a form of the political structure had a significant impact on the content of the First Constitution of Georgia. The ideas and principles presented in it, were in full in compliance with the proclaimed form of political structure, hence, the recognition of the Democratic Republic as a permanent norm, in comparison with the legislative restriction, had a more declarative character and strengthened the path of development of the Georgian society. By virtue of these democratic values and the ideas of humanism, the First Georgian Constitution holds a special place in the history of the world's constitutionalism.

[44] *Javakhishvili P.,* Elements of Constitutional Control in the Constitution of Georgia of 21 February 1921, in: 'Democratic Republic of Georgia and the Constitution of 1921', 2013 (in Georgian).

[45] *Gegenava D., Papashvili T.,* Georgian Model of Revision of the Constitution - Gaps in Normative Regulation and Perspective, 2015, p. 71 (in Georgian).

Nika Arevadze[*]

THE SOCIAL STATE PRINCIPLE AT PLAY: CONSTITUTIONAL CASE-LAW ON SOCIAL MATTERS

ABSTRACT

Social rights hold a distinct historic place in the Georgian constitutionalism. Chapter 13 of the 1921 Constitution of Georgia 'socio-economic rights' encompassed many progressive provisions such as norms on unemployment reduction, social assistance for persons with disabilities, labour rights and emphasized the necessity to guarantee these rights for national minorities. In conformity with this tradition, Article 5 of the modern Constitution declares Georgia a social state. This constitutional principle encompasses a wide array of progressive social objectives and lays the foundation for social rights under Chapter 2 of the Constitution.

Despite their central role in the Georgian Constitution, the justiciability of social rights is linked with conceptual and practical difficulties. This article discusses the approach of the Constitutional Court of Georgia to social rights. With this purpose, the article reviews the case-law of the Court and concludes that it has developed bold standards in specific cases but its overall approach to social rights is restrained and cautious.

In addition, the article analyses conceptual and practical issues that the Court encounters in its case-law on social rights and finds that the challenges identified by the Court pertain to the nature of social rights as well as the mandate and function of the Constitutional Court. These questions are not unique to the Georgian judicial reality and have been often raised in the theory of social rights and international practice alike. Accordingly, the article discusses these conceptual issues and offers theoretical and practical ways of overcoming them based on the practice from various jurisdictions.

I. INTRODUCTION

Social human rights have historically occupied a central place in the Georgian constitutionalism. The 1921 Constitution of Georgia included Chapter 13 – 'Socio-economic rights', which provided progressive provisions such as the reduction of unemployment, social assistance for persons with disability, labour rights, and specifically emphasized the realization of these provisions for the national minorities. Following this tradition, the modern Constitution of Georgia establishes the principle

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of social (welfare) state as one of the foundational provisions in the Preamble. The Constitution elaborates on the meaning of this principle in Article 5, declaring Georgia a social state. This principle encompasses a wide array of social provisions and represents the foundation for social rights provided under Chapter 2 of the Constitution.

Aside from the direct incorporation in the Constitution, social rights enter the Georgian constitutional construction through Article 4. This provision acknowledges 'universally recognized human rights and freedoms that are not explicitly referred to herein, but that inherently derive from the principles of the Constitution,' and stipulates that 'the legislation of Georgia shall comply with the universally recognized principles and norms of international law.' Social rights, as guaranteed by the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other international human rights treaties, impose corresponding requirements on the Georgian legal system as well.

Chapter 2 of the Constitution of Georgia guarantees enforceable human rights and freedoms. Contrary to the constitutional tradition and emphatic declarations, it adopts a minimalist approach towards social rights, especially after the 2018 constitutional amendments, that moved several social provisions out of Chapter 2. This means that there are only a few human rights with a social character that have the potential to be judicially enforced as an individual right, including by the Constitutional Court of Georgia. Consequently, constitutional case-law is not rich with cases on social issues and, therefore, has not developed a comprehensive set of standards to social rights yet. However, the Court has adjudicated on a number of cases concerning substantive social rights and discrimination in social matters. The analysis of these cases shows that the Court considers judicial interference into the state's socio-economic policy as a risk to the principle of separation of powers and, hence, has developed a careful approach towards the justiciability of social rights. This aligns well with the outdated constitutionalist approach that differentiates between economic, social and cultural (ESC) rights on the one hand, and civil and political (CP) rights on the other, and perceives the former as a subordinate at best. These challenges are not unique to the Georgian constitutional practice and have been discussed by judiciaries and scholars for decades. The Covid-19 pandemic and the consequent severe socio-economic crises rejuvenated the discussions on the issues related to health, education, work, environment, an adequate standard of living and equal distribution of welfare, and the means to enforce human rights in these areas. Judicial remedy by constitutional control institutions plays a central role in ensuring that the state's legislative framework complies with its human rights obligations to protect, respect and fulfil. With this authority and a rich record of framework-altering landmark cases, the Georgian Constitutional Court will inevitably face the need to adopt a systematic approach to substantive social rights and discrimination in social matters.

The present article aims to put the Constitutional Court's case-law, its approaches and standards into an international context and explore the conceptual or practical solutions to the challenges of justiciability of social rights. With this purpose, the article analyses the case-law of the Constitutional Court of Georgia in different directions: cases concerning substantive social provisions[1] and cases concerning the rights to equality and dignity in social matters. The article then applies the findings of the case-law analysis to determine what the Court can do to overcome the challenges and guarantee the full realization of social rights. This entails theoretical and comparative analysis of good examples from other courts of a similar mandate.

With this aim in mind, Section II of the article provides the analysis of the current content of the Constitution and the context for its minimalist approach to social rights; Section III discusses the case-law of the Constitutional Court on social matters and explores main challenges, as well as potential strengths for progressive developments in the future; Section IV puts the approach of the Court in a conceptual context and presents potential ways to overcome the aforementioned challenges; Section V concludes the article.

II. THE CONSTITUTION AND SOCIAL RIGHTS

This chapter aims to provide an overview of the case-law of the Constitutional Court of Georgia on the justiciability of social rights. However, it is also necessary to provide the context for the role of the Court, as well as the content of social rights in the Georgian Constitution. The current text of the Georgian Constitution has been in force since its amendment in 2018, which substantially altered the content of social rights in the constitution. At present,[2] the constitution includes provisions relating to social rights in two of its chapters. Article 5 in Chapter I ('General Provisions') declares Georgia a 'social state' and provides overarching policy objectives relating to social justice, equality, solidarity, and equitable socio-economic development. Article 5 also directs the state to 'take care of' specific substantive social issues, such as health and social care, subsistence minimum and decent housing, unemployment, environmental protection, etc. On the other hand, Chapter II ('Fundamental Human Rights') contains enforceable social rights, such as labour rights (Article 26), the right to education (Article 27), the right to health (Article 28), the right to a healthy environment (Article 29), as well as the right to equality (Article 11), which is an indispensable mechanism for ensuring social rights.

[1] In this part, the article discusses the cases involving substantive provisions in Chapter 2 of the Georgian Constitution, both before and after the 2018 constitutional amendments.

[2] Current version of the Georgian Constitution, available at: <https://matsne.gov.ge/ka/document/view/30346?publication=36> (accessed 1.7.2021).

Before the amendments,[3] Chapter II of the Constitution included some of the provisions that are now under Article 5. For example, before 2018, Article 32 of the Constitution provided that 'the State shall promote helping the unemployed find work. Conditions for ensuring some minimum standard of living and status for the unemployed shall be determined by law'; Article 31 guaranteed 'equal socio-economic development for all regions of the country'; Article 36(2) obliged the state to promote family welfare. These provisions have now been modified and moved to Chapter I. Some of the remaining social provisions have also been curbed and limited: the scope of the right to health now covers only citizens, whereas it was worded as 'everyone's' right before. Apart from the declaratory and conceptual implications of demoting human rights to policy objectives, the amendments also had practical ramifications for enforcing these provisions through judicial review. According to Article 60(4)(a) of the Constitution, the Constitutional Court, which is the judicial body of constitutional control in Georgia, has the power to review persons' or the Public Defender's claims on the constitutionality of normative acts only with respect to the rights and freedoms enumerated in Chapter II of the Constitution. Therefore, as the provisions of social rights were moved out from Chapter II of the Constitution, they were effectively rendered into nonjusticiable and unenforceable declaratory statements. Moreover, apart from weakening the substantive social rights framework in the Constitution, the amendments also pushed the instrumental Article 39 out of Chapter II and away from the reach of the Constitutional Court. The provision allowed applicants to invoke 'other universally recognized rights' that were not namely included in Chapter II, but stemmed from the Constitution's fundamental principles. As the Constitution of Georgia provides for a wide variety of universally recognized civil and political (CP) rights, but only a scarce selection of economic, social and cultural (ESC) rights, this constitutional amendment was arguably aimed at preventing the Constitutional Court from expanding the latter.

Few civil society organizations in Georgia objected to these foreseeable effects while commenting on the draft of amendments,[4] and offered an alternative text for the amendments that included the right to adequate housing, the creation of unemployment programs, social assistance for the unemployed, and extended versions of other social rights in Chapter II.[5] However, as the amendments also included significant changes

[3] Version of the Georgian Constitution before 2018, available at: <https://matsne.gov.ge/ka/document/view/30346?publication=34> (accessed 1.7.2021).

[4] *Jowell J.,* Review of Amendments to the Constitution of Georgia in Respect of Human Rights and Judiciary Matters, USAID and East-West Management Institute, 2017, available at: <http://ewmi-prolog.org/images/files/2106PROLoGReviewofConstitutionalAmendmentstoHRandJudiciaryrelatedmattersJeffreyJowellENG.pdf > (accessed 15.6.2021); EMC Assesses the Work of the Constitutional Commission and the Project of Constitutional Changes, 2017, available at: <https://socialjustice.org.ge/en/products/emc-assesses-the-work-of-the-constitutional-commission-and-the-project-of-constitutional-changes-5> (accessed on 8 April 2021).

[5] *Natsvlishvili V. and others*, The Draft Constitutional amendments on social Rights, 2017.

to the political system and the separation of power, social rights remained out of the spotlight and the amendments entered into force with only a brief explanation in the explanatory note of the draft bill, according to which the provisions moved to Chapter I belong to state's general social responsibility, and the expansion of the rights (including social rights) would still be possible through the human right of dignity and the other rights, remaining in Chapter II.[6]

The limitation of the justiciable social rights content in the Georgian Constitution was linked to the conservative argument that justiciability of social rights leads the courts to enter the territory of social policy and budgetary resource allocation, which is the exclusive domain of the legislative branch.[7] However, this approach was also aligned with and preceded by the case-law of the Constitutional Court, which had been careful not to encroach on the mentioned territory, even before the amendments. For instance, in 2009[8] the Court defined the scope of the constitutional provision providing for equal socio-economic development for the country regions with special privileges 'to ensure the socio-economic progress of high mountain regions.'[9] The provision was enshrined in Chapter II of the Constitution, but the Court indicated that this fact did not *per se* entail enforceability and this provision was a manifestation of the social state principle, thus, not a human right.[10] In another example,[11] the Court reviewed whether social assistance for socially vulnerable persons fell within the scope of Article 39 that would allow applicants to invoke other universally recognized human rights within the constitutional review. The Court determined that the issue of social assistance fell within the scope of Article 32 which provided for the state's responsibility to aid the unemployed and ensure a minimum standard of living in the pre-2018 version of the Constitution, which stemmed from the principle of the social state. Therefore, there was no need to bring in other internationally recognized social rights in the case through Article 39.[12]

[6] Explanatory Note for the Draft Constitutional Law on Amendments to the Constitution of Georgia, p. 4.

[7] *Jowell J.,* Review of Amendments to the Constitution of Georgia in Respect of Human Rights and Judiciary Matters, USAID and East-West Management Institute, 2017, pp. 5–6, available at: <http://ewmi-prolog.org/images/files/2106PROLoGReviewofConstitutionalAmendmentstoHRandJudiciaryrelatedmattersJeffreyJowellENG.pdf > (accessed 15.6.2021).

[8] Judgment of the Constitutional Court of Georgia of 31 March 2008 - *Citizen of Georgia Shota Beridze and others v. the Parliament of Georgia* (N2/1-392), available at: <https://constcourt.ge/ka/judicial-acts?legal=304> (accessed 1.7.2021).

[9] Version of the Georgian Constitution before 2018, Article 31, available at: <https://matsne.gov.ge/ka/document/view/30346?publication=34> (accessed 1.7.2021).

[10] Judgment of the Constitutional Court of Georgia of 31 March 2008 - *Citizen of Georgia Shota Beridze and others v. the Parliament of Georgia* (N2/1-392), II paras. 9-21, available at: <https://constcourt.ge/ka/judicial-acts?legal=304> (accessed 1.7.2021).

[11] Recording notice of the Constitutional Court of Georgia of 7 July 2017 - *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia* (N2/11/663), available at: <https://constcourt.ge/ka/judicial-acts?legal=954> (accessed 1.7.2021).

[12] Recording notice of the Constitutional Court of Georgia of 7 July 2017 - *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia* (N2/11/663), II paras. 8-22, available at: <https://constcourt.ge/

Coincidentally, the substantive provisions from both examples, on the socio-economic development of mountainous regions and state's responsibility to ensure the minimum standard of living and aid the unemployed, are now stripped off of their constitutional status as fundamental rights and are included in Chapter I of the current Constitution along with the instrumental provision (former Article 39) that allowed applicants to invoke international human rights in constitutional proceedings. Therefore, the constitutional amendments limiting the scope of social rights and the careful approach of the Constitutional Court to the provisions of social nature were aligned, and the case-law of the Court might have provided instructions on which provisions to move out from Chapter II of the Constitution.

The next section provides a closer look at the case-law of the Constitutional Court with respect to social matters and analyzes the common challenges and tendencies of the Court's approach.

III. CASE-LAW OF THE CONSTITUTIONAL COURT OF GEORGIA

The Constitutional Court has been the central institution for protecting human rights, particularly through its mandate to review constitutional applications lodged by individuals and legal persons. This is affirmed by an ever-increasing annual number of constitutional applications[13] and a trove of landmark judgements and decisions favouring individuals' rights and freedoms. However, partly due to the minimalist constitutional approach towards ESC rights even before the amendments, the Court's case-law is scarce with respect to social rights and issues. Regardless, the Court has reviewed cases concerning social matters and has developed respective case-law in several different directions. This section provides a brief overview of the Court's approaches and considerations towards social rights according to the following typology of cases: (1) cases with a general discussion on social rights; (2) cases involving substantive social rights (both before and after the 2018 amendments); and (3) cases concerning equality and dignity in social matters.

1. THE COURT ON THE NATURE OF SOCIAL RIGHTS

The Court has discussed the general nature of social rights and the overarching principle of social state on rare occasions. In one such case from 2009,[14] the Court reviewed the

ka/judicial-acts?legal=954> (accessed 1.7.2021).

[13] Constitutional Court of Georgia, Information on Constitutional Justice in Georgia, 2019, p. 96, available at: https://constcourt.ge/files/4/Report%202019%20ENG.pdf.

[14] Judgment of the First Chamber of the Constitutional Court of Georgia of 27 August 2009 - *Public Defender of Georgia v. the Parliament of Georgia* (N1/2/434), available at: <https://constcourt.ge/ka/judicial-acts?legal=366> (accessed 1.7.2021).

constitutionality of the rule barring individuals from seeking judicial remedy for the assessment methodology, levels and amount of social assistance with respect to the right to a fair trial. The applicant argued that the rights to social assistance, security and protection were part of the Georgian Constitution on the basis of its provisions with social nature, the principle of social state and the internationally recognized social rights. Accordingly, any state action concerning these matters would fall within the category of regulating legal rights, thus, should have been subject to judicial control.

The Court deliberated on two issues in this case: firstly, whether the disputed norm violated the rights to social security and social assistance, and, secondly, whether it violated the right to a fair trial and access to judicial review vis-à-vis the right to equality and other fundamental rights, which might have been restricted by the disputed norm. While the Court was unanimous in declaring the disputed norm unconstitutional on the latter basis, it was not as decisive about the former issue. In fact, the opinion of the justices was divided equally (2-2 split) regarding the justiciability of the right to social assistance and social security, and the Court could not reach an agreement, leaving the matter undecided.[15] The dissenting opinion of the justices *Ketevan Eremadze* and *Besarion Zoidze* took a strong stance against other judges position of non-justiciability of social rights and, based on the international human rights framework, pointed to the state's obligation for the progressive realization of social rights in accordance with its available resources.[16] Finally, the opinion acknowledged the risk of violating the principle of the separation of powers through adjudicating on social rights and called for judicial restraint and caution in such cases. However, it strongly rejected that social rights are nonjusticiable by pointing to the distinction between political and legal domains in social matters and stating that non-justiciability would give the state absolute free reign against the very requirements of the separation of powers and the checks and balances, stemming from it.[17]

More recent deliberation on the nature of social rights was included in the 2017 recording notice[18] in the case *Tandashvili v. the Government of Georgia*.[19] The applicant

[15] Judgment of the First Chamber of the Constitutional Court of Georgia of 27 August 2009 - *Public Defender of Georgia v. the Parliament of Georgia* (N1/2/434), II para. 5, available at: <https://constcourt.ge/ka/judicial-acts?legal=366> (accessed 1.7.2021).

[16] Dissenting Opinion of the justices – *Eremadze and Zoidze* - regarding the reasoning part of the Judgment of the First Chamber of the Constitutional Court of Georgia of 27th August 2009 (N1/2/434), paras. 6–10, available at: <https://constcourt.ge/ka/judicial-acts?legal=366> (accessed 1.7.2021).

[17] Dissenting Opinion of the justices – *Eremadze and Zoidze* - regarding the reasoning part of the Judgment of the First Chamber of the Constitutional Court of Georgia of 27th August 2009 (N1/2/434), paras. 17, available at: <https://constcourt.ge/ka/judicial-acts?legal=366> (accessed 1.7.2021).

[18] Recording notice of the Constitutional Court of Georgia of 7 July 2017 - *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia* (N2/11/663), available at: <https://constcourt.ge/ka/judicial-acts?legal=954> (accessed 1.7.2021).

[19] It should be noted that, as this case represents a landmark case in the Court's case-law on social rights, its analysis is divided and distributed in different parts of this article.

questioned the constitutionality of the rule that excluded persons in unlawful possession of the premises owned by the state from registering in the registry for socially vulnerable families. The registry in question was a centralized database for socially vulnerable families and provided the only avenue for the eligibility for state-provided social assistance for those in need. The applicant argued that the rule barred the vulnerable from receiving social assistance and effectively forced them to choose between the roof over their head or bread on their table. Furthermore, persons in an identical situation, who managed to register before the disputed norm entered into force, were receiving the assistance without any issues. Based on these circumstances, she claimed that the disputed norm violated her constitutional rights to life, equality, dignity and a fair trial, as well as the universally recognized right to social security and assistance.[20]

Through the recording notice, the Court partially admitted this case for consideration on merits with regards to the rights to equality and dignity and declared it inadmissible with respect to the rights to life, a fair trial, as well as social security and assistance.[21] While deciding on the admissibility, the Court considered the nature of the right to social security under the constitutional provision providing for the state's responsibility to ensure a minimum standard of living for the unemployed. The Court observed the distinction between 'fundamental rights' and social rights and noted that, while the former are mostly self-enforcing, the realization of social rights is directly dependent on the state resources and requires the accumulation and distribution of considerable funds. According to this reasoning, social rights are the elements of the social state principle and the Constitution is less demanding of the state in this respect than in the case of 'fundamental rights.'[22] It should be noted that this deliberation refers to the rights related to social security and assistance, and not to the social rights at large. Nonetheless, the wording and content of this reasoning signal that there is a hierarchy between 'fundamental' rights and social provisions and it is implicit that the latter represent glorified policy objectives, rather than real human rights.

The reasoning of the Court in both cases signals its reluctance to substantively adjudge on the matters of social security and reveals a conservative approach towards the justiciability of social rights, in particular those related to social security and assistance. This approach questions the indivisibility of human rights and establishes a false hierarchy, where civil and political rights are the 'real' and enforceable human rights,

[20] The Court's reasoning on this issue is discussed above, in relation to the Articles 32 and 39 of the Constitution (before the 2018 amendments) and will not be reiterated here.

[21] Recording notice of the Constitutional Court of Georgia of 7 July 2017 - *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia* (N2/11/663), III para. 1, available at: <https://constcourt.ge/ka/judicial-acts?legal=954> (accessed 1.7.2021).

[22] Recording notice of the Constitutional Court of Georgia of 7 July 2017 - *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia* (N2/11/663), II paras. 17-18, available at: <https://constcourt.ge/ka/judicial-acts?legal=954> (accessed 1.7.2021).

and social rights are declaratory or programmatic manifestations of general principles of social justice and equality, or the principle of the social state, as referred to in the Georgian Constitution. The Constitutional Court based its reasoning on the challenges of the enforcement of social rights that are also recognized internationally, namely their direct budgetary implications, judicial incompetence to decide the matters of economic and social policy, and the risks vis-à-vis the separation of powers. However, Section IV of the article showcases that these challenges can be addressed and overcome in the judicial review of the cases concerning social rights.

2. THE COURT ON SUBSTANTIVE SOCIAL RIGHTS THAT HAVE BEEN REMOVED FROM CHAPTER II OF THE CONSTITUTION

As mentioned above, the Constitution of Georgia incorporates enforceable and justiciable human rights and freedoms under its catalogue of fundamental rights in Chapter II. Through the 2018 constitutional amendments, a number of provisions were removed from Chapter II and relocated to Chapter I. These provisions included the state's obligations to promote family welfare, aid the unemployed in the search of work and ensure a minimum standard of living, guarantee equal socio-economic development for all regions (with special emphasis on the high mountain regions), and encompassed more extensive wording on labour rights, including the fair compensation and healthy conditions of work, with special emphasis on minors and women. The Court has not discussed any claims related to these provisions since 2018, as it was removed from Court's authority to review individual complaints on these issues.

It should be mentioned that the Court has often invoked the principle of the social state while adjudicating this group of constitutional provisions. On some occasions, the principle was invoked in order to emphasize the fact that the social rights are dependent on budgetary considerations and subject to judicial restraint or the wide margin of appreciation, afforded to the states.[23] On other occasions, the Court explicitly declared constitutional provisions as nonjusticiable policy objectives, such as the provision of equal socio-economic development of all regions of the country.[24]

The Court has on few occasions considered the provision imposing a state responsibility to aid the unemployed in finding work and ensure a minimum standard of living. In the

[23] Recording notice of the Constitutional Court of Georgia of 7 July 2017 - *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia* (N2/11/663), II paras. 17-18, available at: <https://constcourt.ge/ka/judicial-acts?legal=954> (accessed 1.7.2021).

[24] Judgment of the Constitutional Court of Georgia of 31 March 2008 - *Citizen of Georgia Shota Beridze and others v. the Parliament of Georgia* (N2/1-392), II paras. 18-21, available at: <https://constcourt.ge/ka/judicial-acts?legal=304> (accessed 1.7.2021).

case from 2003[25] the Court ruled that, along with the determination of the unemployed status and helping the unemployed to find work, the provision also protects the right to receive compensation after the dismissal from work. In another case from 2016,[26] the Court held that social compensation based on work experience did not fall within the scope of this constitutional provision. In the recording notice of the *Tandashvili* case,[27] the Court held that social assistance for vulnerable families fell within the scope of this constitutional provision and, in this way, implicitly distinguished the 'minimum standard of living' part of the provision from the unemployment-related stipulations. Prior to that, the scarce case-law viewed this constitutional provision as strictly related to unemployment and this recording notice expanded the scope of this constitutional provision.[28] However, it also had the effect of preventing the applicant from invoking other internationally recognized social rights and opening a Pandora's box of similar constitutional applications for the Court.

The Court has also reviewed rare cases concerning state responsibility to promote family welfare. In a 2014 case,[29] the Court defined the scope of this constitutional provision and stated that this provision obligated the state to promote family welfare and take certain measures in this respect. Accordingly, the 'full realization of the constitutional right to family welfare requires securing appropriate legislative guarantees that will ensure the full protection of family relationships.'[30] The Court held that this requires the state to avoid unjustified interference into family relationships and take effective measures to ensure family welfare. Therefore, the constitutional provision on family welfare was recognized by the Court as a constitutional right with negative and positive elements. However, no further substantive interpretation or application of this right can be found in the case-law of the Constitutional Court of Georgia.

[25] Judgment of the Constitutional Court of Georgia of 23 March 2003 - *Citizens of Georgia Davit Silagadze, Liana Darsania and Ekaterine Tsotsonava v. the Parliament of Georgia* (N1/3/301), available at: <https://www.constcourt.ge/ka/judicial-acts?legal=1213> (accessed 1.7.2021).

[26] Judgment of the Constitutional Court of Georgia of 12 December 2005 - *Citizens of Georgia Kakhaber Dzagania and Giorgi Gugava v. the Parliament of Georgia* (N2/6/322), available at: <https://constcourt.ge/ka/judicial-acts?legal=270> (accessed 1.7.2021).

[27] Recording notice of the Constitutional Court of Georgia of 7 July 2017 - *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia* (N2/11/663), available at: <https://constcourt.ge/ka/judicial-acts?legal=954> (accessed 1.7.2021).

[28] Version of the Georgian Constitution before 2018, Article 32, available at: <https://matsne.gov.ge/ka/document/view/30346?publication=34> (accessed 1.7.2021).

[29] Recording Notice of the Constitutional Court of Georgia of 11 November 2014 - *Public Defender of Georgia v. the Government of Georgia* (N2/9/603), available at: <https://constcourt.ge/ka/judicial-acts?legal=655> (accessed 1.7.2021).

[30] Recording Notice of the Constitutional Court of Georgia of 11 November 2014 - *Public Defender of Georgia v. the Government of Georgia* (N2/9/603), II para. 4, available at: <https://constcourt.ge/ka/judicial-acts?legal=655> (accessed 1.7.2021).

These cases and provisions do not have direct relevance for the Court's judicial practice since 2018, as these substantive provisions and the instrumental provision, allowing applicants to invoke other internationally recognized social rights, have been transformed into nonjusticiable general principles. However, the standards established in these cases might create the fundament for the constitutional review on social matters from different angles, such as the right to equality, dignity or remaining substantive provisions of social nature. The next subsection of the article takes a look at the case-law concerning the social rights that are currently present in the Constitution of Georgia.

3. THE COURT ON SUBSTANTIVE SOCIAL RIGHTS REMAINING IN CHAPTER II OF THE CONSTITUTION

At present, Chapter II of the Constitution encompasses a few substantive human rights of social nature such as labour rights, including safe working conditions, unionization and right to strike (Article 26), the right to education (Article 27), the right to health (Article 28), the right to a healthy environment (Article 29) and the rights of mothers and children (Article 30). This part of the article provides an overview of the Court's interpretation of these substantive social provisions.

The Court has adjudged a number of cases involving labour rights and, as a result, has defined the scope of the right. In the judgement on a 2007 case *Natadze v. Parliament* the Court asserted that freedom of labour should be interpreted in the light of the social state principle and held that the Constitution protects not only the right to freely choose work but also the rights to perform, maintain or quit, be protected from unemployment or regulations that allow unjust, arbitrary and unfounded dismissal from work.[31] The judgment also defined that only the activities that serve a person's financial security and personal development (self-realization) can qualify as constitutionally protected labour.[32] Subsequently, the Court did not deem the positions in university and faculty boards as fitting under the constitutional definition of labour as they were not primary, but rather additional and honorary positions.

Another landmark case concerning labour rights is the case *Lezhava and Rostomashvili v. Parliament*,[33] where the Court had to review the rule determining maximum weekly

[31] Judgment of the Constitutional Court of Georgia 26 October 2007 - *Citizen of Georgia Maia Natadze and others v. The Parliament and the President of Georgia* (N2/2-389), II para. 19, available at: <https://www.constcourt.ge/ka/judicial-acts?legal=301> (accessed 1.7.2021).

[32] Judgment of the Constitutional Court of Georgia 26 October 2007 - *Citizen of Georgia Maia Natadze and others v. The Parliament and the President of Georgia* (N2/2-389), II para. 20, available at: <https://www.constcourt.ge/ka/judicial-acts?legal=301> (accessed 1.7.2021).

[33] Judgment of the Constitutional Court of Georgia of 19 April 2016 - *Citizens of Georgia Ilia Lezhava and Levan Rostomashvili v. The Parliament of Georgia* (N2/2/565), available at: <https://constcourt.ge/ka/judicial-acts?legal=1077> (accessed 1.7.2021).

work hours for certain types of workplaces (with specific work regimes) as 48 hours in comparison to the regular 40 hours with respect to the right to freedom of labour. In the judgment, the Court linked the freedom of labour to a person's life, dignity, and personal and social development, and defined it as entailing the prohibition of forced labour, but also the obligation of the state to create legal guarantees ensuring the freedom of labour. Notably, the Court discussed this provision in the light of the factual disbalance between employees and employers, emphasizing greater power of employers to influence contractual conditions for work, when employees' dignified life is often 'significantly dependent on performing work and being remunerated for it'. To level this disbalance, the freedom of labour requires the state to regulate labour law-related relationships to protect the workers' interests, including guaranteeing an adequate, non-discriminatory and dignified work environment and fair work conditions.[34] The Court went on to consider working time as an element of the freedom of labour and stated that working time has a significant impact on a person's social life and health, thus, in the absence of protective measures, the employees might be forced to sacrifice their social realization and health to keep or acquire employment. Consequently, the state is required to determine a reasonable maximal time limit for work and strong regulations to guarantee enforcement.[35] However, the Court did not rule that a 48-hour-long workweek was unreasonably long and maintained that it did not upset the fair balance between the freedom of labour and the freedom of entrepreneurship.

The substantive application of the right to education took place in only one case – *Darbinian and others v. Parliament*, where the applicant successfully challenged the rule reserving state funding for primary education for citizens only. Along with the right to equality, the Court reviewed the rule with respect to the right to education and found the rule unconstitutional. The Court discussed the nature of the right to education and emphasized that education is an indivisible part of social life and human development and represents a foundation for personal liberty, free development and meaningful integration. Furthermore, the full realization of the right to education exceeds individual benefits and represents a vital public objective, because an educated society creates the basis for democracy, the Rule of law and human rights. Therefore, funding education should not be perceived as a privilege or assistance granted by the state and the full realization of the right to education, including free primary education, is one of the primary obligations of the state.[36] However, the Court also noted that the right to

[34] Judgment of the Constitutional Court of Georgia of 19 April 2016 - *Citizens of Georgia Ilia Lezhava and Levan Rostomashvili v. The Parliament of Georgia* (N2/2/565), II paras. 30–36, available at: <https://constcourt.ge/ka/judicial-acts?legal=1077> (accessed 1.7.2021).

[35] Judgment of the Constitutional Court of Georgia of 19 April 2016 - *Citizens of Georgia Ilia Lezhava and Levan Rostomashvili v. The Parliament of Georgia* (N2/2/565), II paras. 38–43, available at: <https://constcourt.ge/ka/judicial-acts?legal=1077> (accessed 1.7.2021).

[36] Judgment of the Constitutional Court of Georgia of 12 September 2014 - *Citizens of Russia Oganes Darbinian, Rudolf Darbinian, Susanna Jamkotsian and Citizens of the Republic of Armenia Milena*

education is not an absolute right and it can be restricted if overweighed by countering legitimate aims. A legitimate aim given in this case was the preservation of exhaustible resources i.e. budgetary funds. The Court noted that the state is afforded a wide margin of appreciation when dealing with limited resources and planning economic strategy, but such resources should be aimed at the effective realization of fundamental human rights in the first place. To decide on the constitutionality of the restriction, the Court discussed the significance of and the risks connected to the exclusion of certain groups from primary education and weighed these considerations against the financial burden of funding resident non-citizens' primary education. The Court did not consider that the legitimate aim outweighed the human rights interests at play and declared the rule unconstitutional.[37]

The Court has discussed the right to a healthy environment on several occasions. In the case *Gachechiladze v. Parliament*,[38] the Court decided on the constitutionality of the rule allowing the Ministry of Energy and Natural Resources to conclude an agreement that allowed all the actions committed/carried out vis-à-vis the environment and natural resources to be deemed legitimate, effectively providing the Ministry with the power of providing an exemption from legal responsibility. The Court determined that the constitutional right to a healthy environment had negative and positive elements - obliging the state to minimize the negative impact on the environment while executing projects and protect it from harm. The positive obligation entails the establishment of adequate legal mechanisms to prevent and respond to environmental harm from third persons. The Court explained that there is a need to balance the economic and social development on the one side and environmental protection for society's wellbeing on the other, and found the disputed rule contrary to this balance, thus declaring it unconstitutional.[39] The Court has also discussed the state's obligation to collect and process the information on environmental protection and the human right to receive such information. In the *Gachechiladze* case, the Court pointed out that this right was a crucial participatory right and obliged the state to collect information on the constituent elements of the environment and factors that have an impact on it and provide access to

Barseghian and Lena Barseghian v. the Parliament of Georgia (N 2/3/540), II paras. 15–21, available at: <https://constcourt.ge/ka/judicial-acts?legal=907> (accessed 1.7.2021).

[37] Judgment of the Constitutional Court of Georgia of 12 September 2014 - *Citizens of Russia Oganes Darbinian, Rudolf Darbinian, Susanna Jamkotsian and Citizens of the Republic of Armenia Milena Barseghian and Lena Barseghian v. the Parliament of Georgia* (N 2/3/540), II paras. 27–35, available at: <https://constcourt.ge/ka/judicial-acts?legal=907> (accessed 1.7.2021).

[38] Judgment of the Constitutional Court of Georgia of 4 October 2013 - *Citizen of Georgia Giorgi Gachechiladze v. the Parliament of Georgia* (N2/1/524), available at: <https://constcourt.ge/ka/judicial-acts?legal=433> (accessed 1.7.2021).

[39] Judgment of the Constitutional Court of Georgia of 4 October 2013 - *Citizen of Georgia Giorgi Gachechiladze v. the Parliament of Georgia* (N2/1/524), II paras. 1–15, available at: <https://constcourt.ge/ka/judicial-acts?legal=433> (accessed 1.7.2021).

it.[40] In the case *Green Alternative v. Parliament*,[41] the Court dealt with the prohibition on access to information on subsoil without the owner's consent and considered it as part of the right to access information on the environment, but decided that the absence of the rule would disproportionally damage the interests of the owner companies.[42]

The Court has not adjudicated on the right to health at great length yet and has only passingly discussed the rights of mothers and children in a 2020 ruling.[43] The Court found the applicants' claim unsubstantiated, which alleged that the provision in question encompasses the state's obligation to provide social assistance and aid in finding employment for persons protected under this provision.

4. THE COURT ON EQUALITY AND DIGNITY IN SOCIAL MATTERS

In sharp contrast with substantive social rights in the constitution, the Court has developed considerable case-law with respect to equality in matters of social nature. Many cases concerning substantive social provisions also include the claims of discrimination. For instance, the *Darbinian and others* case also disputed the constitutionality of the rule barring non-citizens from receiving funding for primary education with respect to the non-discrimination norm.[44] The Court determined that this differentiation was characterized by high intensity and applied a strict test of scrutiny, which the legitimate aim of preserving limited budgetary resources could not pass. Consequently, the rule was found unconstitutional in this account as well.[45] Similarly, in the case *Lezhava and Rostomashvili v. Parliament* the applicants claimed that, besides their labour rights, the rule providing for different maximum weekly hours of work for specific regime

[40] Judgment of the Constitutional Court of Georgia of 4 October 2013 - *Citizen of Georgia Giorgi Gachechiladze v. the Parliament of Georgia* (N2/1/524), II para. 20, available at: <https://constcourt.ge/ka/judicial-acts?legal=433> (accessed 1.7.2021).

[41] Judgment of the Constitutional Court of Georgia of 14 December 2018 - *N(N)LE 'Green Alternative' v. the Parliament of Georgia* (N3/1/752), available at: <https://constcourt.ge/ka/judicial-acts?legal=1192> (accessed 1.7.2021).

[42] Judgment of the Constitutional Court of Georgia of 14 December 2018 - *N(N)LE 'Green Alternative' v. the Parliament of Georgia* (N3/1/752), available at: <https://constcourt.ge/ka/judicial-acts?legal=1192> (accessed 1.7.2021).

[43] Recording Notice of the Constitutional Court of Georgia of 5 June 2020 - *Elga Maisuradze, Irma Ginturi and Leri Todadze v. the Parliament of Georgia* (N1/7/1320), available at: <https://constcourt.ge/ka/judicial-acts?legal=9517> (accessed 1.7.2021).

[44] Judgment of the Constitutional Court of Georgia of 12 September 2014 - *Citizens of Russia Oganes Darbinian, Rudolf Darbinian, Susanna Jamkotsian and Citizens of the Republic of Armenia Milena Barseghian and Lena Barseghian v. the Parliament of Georgia* (N 2/3/540), II paras. 15–21, available at: <https://constcourt.ge/ka/judicial-acts?legal=907> (accessed 1.7.2021).

[45] Judgment of the Constitutional Court of Georgia of 12 September 2014 - *Citizens of Russia Oganes Darbinian, Rudolf Darbinian, Susanna Jamkotsian and Citizens of the Republic of Armenia Milena Barseghian and Lena Barseghian v. the Parliament of Georgia* (N 2/3/540), II paras. 36–55, available at: <https://constcourt.ge/ka/judicial-acts?legal=907> (accessed 1.7.2021).

enterprises (48 hours) and regular types of work (40 hours) also violated their right to equality. The Court determined that the norm differentiated on the ground of the nature of work and, as the intensity of differentiation was not high, the rational basis test was applied in the case. The Court determined that the disputed rule existed based on the objective needs of specific types of enterprises (with specific work regimes) and did not deem the norm discriminatory.[46]

Another case involving discrimination, that has been discussed in this article, was the *Tandashvili* case. The judgment on this case dealt with the rule that excluded those persons from registering in the registry for the socially vulnerable families, who were unlawfully residing in state-owned spaces. The rule did not cover already registered people, it applied to future registrations instead, including the registration of the applicant of the abovementioned case. While discussing the right to equality, the Court ruled that the registration in the registry for socially vulnerable families was the only way to receive social assistance and other welfare benefits related to this status, and applied the strict scrutiny test in the case. While considering the legitimate aim of protecting state property, the Court did not find the differentiation between comparable groups suitable to achieving this aim and pointed out that both - depriving already registered persons and restricting future registrations would have similarly severe economic implications. Therefore, the Court deemed the norm discriminatory and declared it unconstitutional.[47] However, the novelty of this judgment was the fact that it applied the right to dignity to social welfare matters. It was clear in the case, that the state leveraged social assistance to push the applicant and other persons in a similar situation out of the state properties. As a result, this rule effectively imposed a diabolical choice between subsistence funds and housing for these persons. The Court ruled that this violated the right to dignity and its central requirement that humans cannot be used as instruments to achieve goals.[48]

The Court also considered the differentiation in the amount of social assistance for children. On the one hand, the Court observed the difference between the reintegration allowance and foster care payment and, on the other hand, it examined the differentiation between the reimbursement of child care costs of biological and foster families.[49] While

[46] Judgment of the Constitutional Court of Georgia of 19 April 2016 - *Citizens of Georgia Ilia Lezhava and Levan Rostomashvili v. The Parliament of Georgia* (N2/2/565), II paras. 1–31, available at: <https://constcourt.ge/ka/judicial-acts?legal=1077> (accessed 1.7.2021).

[47] Judgment of the Constitutional Court of Georgia of 11 May 2018 - *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia* (N2/3/663), II paras. 2–38, available at: <https://constcourt.ge/ka/judicial-acts?legal=960> (accessed 1.7.2021).

[48] Judgment of the Constitutional Court of Georgia of 11 May 2018 - *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia* (N2/3/663), II paras. 39–54, available at: <https://constcourt.ge/ka/judicial-acts?legal=960> (accessed 1.7.2021).

[49] Judgment of the Constitutional Court of Georgia of 28 October 2015 - *Public Defender of Georgia v. the Government of Georgia* (N2/4/603), available at: <https://constcourt.ge/ka/judicial-acts?legal=661> (accessed 1.7.2021).

defining the scope of the issue at hand, the Court drew on the international human rights law (IHRL) and stated that the state is obligated to ensure minimum conditions for the raising and development of a child and for its subsistence, but the form of assistance depends on the necessities of the child based on the best interests of the child.[50] In this reasoning, the differences in social assistance were considered reasonable, as they served to create familial conditions for children in need and, therefore, the application was not granted.

The Court has also reviewed the differentiating rule that entitled some persons to a full package of social security under the Universal Healthcare program, and some to only a partial one.[51] The Court considered the harsh socio-economic reality in the country and noted that affordability of healthcare is essential, as the failure in this sense might result in dire or irreversible consequences.[52] The Court pointed out that the state is afforded a wide margin of appreciation in determining the healthcare policy, but it is obligated to provide the selected one on the basis of equality.[53] In response to the state's argument of limited and exhaustible budgetary resources, the Court noted the significance of the Universal Healthcare program and stated that, as this can serve as a justifiable legitimate aim at times, only budgetary considerations cannot serve as an absolution card.[54] Considering the potential impacts on the applicants' health, the Court held that this differentiation was not justifiable and rendered the norm unconstitutional.

However, the Court considered budgetary constraints and the minimization of spending as reasonable justifications in another case. In the case concerning welfare and other types of benefits for residents of high mountainous regions,[55] the Court ruled that the exclusion of permanent resident non-citizens from receiving these benefits was constitutional. In this case, likewise, the Court stated that increasing budgetary

[50] Judgment of the Constitutional Court of Georgia of 28 October 2015 - *Public Defender of Georgia v. the Government of Georgia* (N2/4/603), II paras. 20–21, available at: <https://constcourt.ge/ka/judicial-acts?legal=661> (accessed 1.7.2021).

[51] Judgment of the Constitutional Court of Georgia of 25 October 2017 - *Citizens of Georgia Roin Gavashelishvili and Valeriane Migineishvili v. the Government of Georgia* (N1/11/629, 652), available at: <https://constcourt.ge/constc/public/ka/judicial-acts?legal=1091> (accessed 1.7.2021).

[52] Judgment of the Constitutional Court of Georgia of 25 October 2017 - *Citizens of Georgia Roin Gavashelishvili and Valeriane Migineishvili v. the Government of Georgia* (N1/11/629, 652), II para. 13, available at: <https://constcourt.ge/constc/public/ka/judicial-acts?legal=1091> (accessed 1.7.2021).

[53] Judgment of the Constitutional Court of Georgia of 25 October 2017 - *Citizens of Georgia Roin Gavashelishvili and Valeriane Migineishvili v. the Government of Georgia* (N1/11/629, 652), II para. 13, available at: <https://constcourt.ge/constc/public/ka/judicial-acts?legal=1091> (accessed 1.7.2021).

[54] Judgment of the Constitutional Court of Georgia of 25 October 2017 - *Citizens of Georgia Roin Gavashelishvili and Valeriane Migineishvili v. the Government of Georgia* (N1/11/629, 652), II paras. 31–37, available at: <https://constcourt.ge/constc/public/ka/judicial-acts?legal=1091> (accessed 1.7.2021).

[55] Judgment of the Constitutional Court of Georgia of 7 December 2018 - *Citizens of the Republic of Armenia Garnik Varderesian, Artavazd Khachatrian and Ani Minasian v. the Parliament of Georgia* (N2/9/810, 927), available at: <https://constcourt.ge/ka/judicial-acts?legal=1174> (accessed 1.7.2021).

expenses cannot solely be the justifying argument for differentiation.[56] However, the Court indicated that the strong legal links of citizenship provided more certainty for citizens to remain in the country, whereas permanent residents can be expelled. Consequently, the Court considered that differentiation was reasonable as the state had a higher expectation that citizens would remain on the territory and, hence, the result of these investments would be better for the development of high mountainous regions.

5. THE COURT ON SOCIAL MATTERS (IN SUM)

Regardless of the minimalist constitutional approach to social rights, the Court has developed its own approach and standards to constitutional provisions of social nature. These standards are more concrete and elaborate for the cases that are of negative nature and do not require the state to go an extra mile. Examples of this are the cases concerning labour rights or the right to a healthy environment. At the same time, the Court's case-law is relatively extensive on inclusion in social matters, and, with few exceptions, the Court has annulled discriminatory norms that excluded groups such as non-citizens, persons in need of healthcare or economic assistance, and, in this way, guaranteed the protection of social rights for the vulnerable. The *Tandashvili* case has also sown the seeds for future litigations on social rights and issues from the angle of the right to dignity.

However, the Court's case-law also demonstrates a cautious approach to social rights that involve a financial burden for the state: The Court never fails to indicate a wide margin of appreciation and show deference in such cases. At the same time, the case-law almost always connects social provisions with the constitutional principle of the social state and, as it should normally convey the significance of social provisions, the Court employs this connection at times to establish a hierarchy between fundamental rights and social provisions, implying that they are not really rights. Moreover, while the case-law on the rights to equality and dignity in social welfare matters is promising, it has significant limitations for upholding social rights.

The right to equality in the Constitution entails discrimination analysis and it can only be used to secure substantive social guarantees by eradicating the exclusion of vulnerable groups. Moreover, the Court applies the rational basis and strict scrutiny tests to assess differentiation, and whereas the latter is a classic proportionality test, to pass the former, the state just needs to provide a reasonable explanation for differentiation. The reasons linked to limited budgetary resources can serve as a reasonable explanation

[56] Judgment of the Constitutional Court of Georgia of 7 December 2018 - *Citizens of the Republic of Armenia Garnik Varderesian, Artavazd Khachatrian and Ani Minasian v. the Parliament of Georgia* (N2/9/810, 927), II para. 24, available at: <https://constcourt.ge/ka/judicial-acts?legal=1174> (accessed 1.7.2021).

for differentiation and have resulted in maintaining the *status quo* of the exclusion of vulnerable groups from welfare assistance and benefits. For the mistreatment to be considered under the right to dignity, on the other hand, it has to be of extremely high intensity, to the extent that the disputed norm uses humans as an instrument to achieve a goal. Therefore, as the dignity and equality scrutiny can handle a portion of social issues, they cannot ensure the full realization of social rights.

The reasons behind the Court's cautious and wary approach to social rights and matters are well articulated in the Dissenting Opinion of the justices *Ketevan Eremadze* and *Besarion Zoidze* in a 2009 case.[57] They underline the conceptual and practical challenges that courts face while reviewing cases concerning social matters. They acknowledge that courts face the risk of violating the separation of powers and entering the territory of economic policy-making, and point out that the judges are often not competent to adjudicate on complex matters of social nature. These challenges of justiciability on social matters are not only limited to the Georgian constitutional tradition and have been discussed by judges and scholars for decades. The following sections of the article discuss these challenges and their implications and suggest ways to overcome or outmaneuver them.

IV. THE JUSTICIABILITY OF SOCIAL RIGHTS

1. CHALLENGES

Adjudication on (economic and) social rights has long been at the center of discussion among judicial practitioners and scholars, including in this journal. In an article published in 2019,[58] one of the most esteemed constitutional scholars of our time, *András Sajó* argued against extensive judicial interference in social matters and pointed to the risks of justiciability resulting in policy settings that have direct budgetary implications.[59] According to *András Sajó,* this is a strictly legislative and executive function, constrained by the principle of democratic accountability and dependent on the specific socio-economic circumstances. The judiciary does not meet these criteria, since democratic accountability does not apply to the judges as a rule, and they do not have expertise regarding welfare policies and budgetary matters.[60] On this basis, the

[57] Dissenting Opinion of the justices – *Eremadze* and *Zoidze* - regarding the reasoning part of the Judgment of the First Chamber of the Constitutional Court of Georgia of 27th August 2009 (N1/2/434), paras. 6–10, available at: <https://constcourt.ge/ka/judicial-acts?legal=366> (accessed 1.7.2021).

[58] *Sajó A.,* Possibilities of Constitutional Adjudication in Social Rights Matters, Journal of Constitutional Law 1, 2019, p. 7. The article was published in 2019, but it was prepared and presented in 2009 and might not reflect author's contemporary views.

[59] *Sajó A.,* Possibilities of Constitutional Adjudication in Social Rights Matters, Journal of Constitutional Law 1, 2019, pp. 13–14.

[60] *Sajó A.,* Possibilities of Constitutional Adjudication in Social Rights Matters, Journal of Constitutional Law 1, 2019, pp. 14–15.

article rejects the appropriateness of individual justiciability on substantive social rights and calls on courts to employ other strategies while adjudicating, such as discrimination analysis.[61] While making some refutable claims too,[62] the article put forward theoretical challenges to social rights justiciability that have created conundrums in the case-law of the Georgian Constitutional Court. Moreover, the article's recipe of how courts should adjudicate on social matters correlates with the past years' developments in the Georgian Constitution (weakening of social rights after the 2018 amendments) and approaches of the Court as well..

Some scholars argue that many theoretical issues with the justiciability and enforceability of social rights stem from the fictional separation of human rights into CP and ESC rights.[63] This view establishes a hierarchy between the two sets of rights and proclaims that ESC rights are not legal or fundamental rights, but rather directives and policy objectives. *Katie Boyle*[64] refers to this as a 'false dichotomy' and points to the foundational principles of universality and indivisibility of the rights to establish that IHRL does not provide this hierarchy of rights.[65] She further elaborates on theoretical objections to the justiciability of social rights and categorizes them into three main types:[66] 1) *Anti-democratic critique* – questions the legitimacy of judicial interference into social matters and resource allocation based on the principle of the separation of powers; 2) *The indeterminacy critique* – points to the vagueness of ESC rights and claims that their substantive interpretation should not be left up to the judiciary; 3) *The capacity critique* – argues that the courts do not have the capacity and expertise to deal with complex socio-economic issues and the areas of governance related to them;

However, civil and political rights can also be costly and require resource allocation, for instance, the right to a fair trial or other rights might require setting up expensive enforcement mechanisms. Furthermore, courts often refer to external sources of information and expertise to deal with all types of cases. The Constitutional Court of Georgia has involved experts in its decision-making process of the cases on drug offences or blood donation.

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[61] *Sajó A.,* Possibilities of Constitutional Adjudication in Social Rights Matters, Journal of Constitutional Law 1, 2019, p. 25.

[62] For instance, the article proclaims that extensive enforcement of social rights goes against the principles of free market and non-subordination of one person to another. *Sajó A.,* Possibilities of Constitutional Adjudication in Social Rights Matters, Journal of Constitutional Law 1, 2019, pp. 11–12.

[63] *Tinta M. F.,* Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions, Human Rights Quarterly 2(29), 2007, pp. 431, 432–438.

[64] *Boyle K.,* Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication, 2019.

[65] *Boyle K.,* Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication, 2019, pp. 46–48.

[66] *Boyle K.,* Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication, 2019, pp. 13–16.

Besides, the separation of powers principle does not entail a complete separation; its essential requirements constitute a proper system of checks and balances and accountability mechanisms between the branches. In this sense, judicial supervision over social matters is a requirement of this principle, as explained in the dissenting opinion of the justices *Ketevan Eremadze* and *Besarion Zoidze*.[67] Finally, regardless of the challenges, justiciability of social issues and rights is a requirement of the international legal setting: social rights are human rights, and their full realization requires judicial oversight and the corresponding access to remedy for individuals.[68] Therefore, the contemporary question is not whether social rights are justiciable or not, but rather how the courts can overcome the abovementioned challenges and adjudicate on cases concerning social matters. The next subsection of the article provides an overview of the potential approaches the Constitutional Court of Georgia can employ for this purpose.

2. POTENTIAL APPROACHES FOR OVERCOMING CHALLENGES

The question of how the courts should approach social matters does not have a definitive answer as there is no consensus among judiciaries. Scholars distinguish three main approaches of judicial review: strong, weak and intermediate review systems. The strong review systems recognize social rights as justiciable, directly enforceable human rights, whereas weak review systems entail great deference to executive and legislative branches.[69] The intermediate review systems recognize justiciability and enforceability, but also include more flexible instruments of review.[70] Others distinguish between the deferential and managerial judicial review systems.[71] These typologies serve to better understand different review systems theoretically, but in reality, the approaches might differ on a case-by-case basis. The case-law of the Georgian Constitutional Court demonstrates the variability of approaches: in some cases, the Court has denied

[67] Dissenting Opinion of the justices – *Eremadze* and *Zoidze* - regarding the reasoning part of the Judgment of the First Chamber of the Constitutional Court of Georgia of 27th August 2009 (N1/2/434), paras. 6–10, available at: <https://constcourt.ge/ka/judicial-acts?legal=366> (accessed 1.7.2021).

[68] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para. 4, available at: <https://www.refworld.org/docid/47a7079d6.html> (accessed 1.7.2021).

[69] *Tushnet M.,* Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights, Comparative Constitutional Law, 2009, pp. 22–31.

[70] *Rodríguez-Garavito C., Rodríguez-Franco D.,* Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South, 2015, pp. 10–12, available at: <https://www.cambridge.org/core/books/radical-deprivation-on-trial/E5288EDB3B74666BBD62542C5B256F0F> (accessed 15.6.2021).

[71] *Young K. G.,* Constituting Economic and Social Rights, 2012, pp. 142–166, available at: <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199641932.001.0001/acprof-9780199641932> (accessed 15.6.2021).

justiciability of social rights altogether, whereas in other cases it has adopted the strict scrutiny test and invoked the absolute right to dignity in connection with social issues for the vulnerable. In this context, it might be more appropriate to identify potential theories and concepts that the Court can apply while adjudicating on social matters.

As determined through the analysis of the Georgian constitutional framework of social rights, only a few substantive rights remain in the Constitution that can be adjudicated on by the Constitutional Court on the basis of individual applications; the main avenue of constitutional redress is the right to equality, and the Court has developed a novel approach by reviewing and declaring a norm of social nature unconstitutional with respect to the right to dignity. The consideration below takes this as a basis for further analysis of the internationally recognized theories, concepts and interpretation methods.

The concept of minimum core obligations (MCO) has emerged through the interpretations of the content of the ICESCR. MCO refers to the state's obligation to ensure, at the very least, minimum essential levels of substantive social rights and if it fails to do so, the violation of substantive social rights is found. However, MCO is directly connected to the state's resources, but the state must prove that due to the lack of available resources, it is unable to meet MCO for a specific right.[72] For instance, MCO for the right to education includes non-discrimination in access to public education, providing primary education for all, adopting a national educational strategy and ensuring free choice of education in conformity with 'minimum educational standards.'[73] MCOs for the right to just and favourable conditions of work include: non-discrimination, establishing legislative minimum wages, establishing a national policy on occupational safety and health, minimum standards of rest, leisure, reasonable limitation of working hours, paid leave and public holidays, etc.[74] MCOs for the right to the highest attainable standard of health include the non-discrimination in the access to healthcare, access to the minimum essential food and freedom from hunger to everyone, access to basic shelter, housing, and an adequate supply of safe and potable water, provision of essential drugs, etc.[75] Apart from MCOs, while defining the scope of specific rights, it can be useful to draw

[72] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1of the Covenant), 14 December 1990, E/1991/23, para. 10, available at: <https://www.refworld.org/pdfid/4538838e10.pdf> (accessed 15.6.2021).

[73] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10, para. 57, available at: <https://www.refworld.org/docid/4538838c22.html> (accessed 15.6.2021).

[74] UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 23 (2016) on the right to just and favourable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights), 7 April 2016, E/C.12/GC/23, para. 65, available at: <https://www.refworld.org/docid/5550a0b14.html> (accessed 15.6.2021).

[75] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para. 43, available at: <https://www.refworld.org/pdfid/4538838d0.pdf> (accessed 15.6.2021).

on the authoritative definitions of international corresponding provisions, such as the constitutive elements of Availability, Accessibility, Acceptability and Quality (AAAQ) for the right to health.[76]

The Constitutional Court is not obligated to implement the IHRL standards in its case-law, on contrary, it is solely bound by the Constitution of Georgia. However, the international law standards and the comparative analysis can often aid the national judicial review in interpreting and defining the scope of rights in the absence of corresponding case-law. This is not unusual for the Constitutional Court either, because it has referred to and drawn on international human rights treaties at times, including the ICESCR. At the same time, it is not necessary to copy international standards unchanged, they can be modified to fit in the domestic context. For instance, the Constitutional Court of Columbia has adopted a modified MCO standard in the form of a 'vital minimum' for ESC rights.[77] The Indian Supreme Court employs the phrase 'the essential minimum of the right' to convey the same content and principle.[78]

However, in other examples, the courts have opted not to apply MCO in their jurisdiction, for instance, the Constitutional Court of South Africa has explicitly refused to implement the MCO standard in its landmark case *Grootbroom v. the Government of South Africa*.[79] The Court noted that the constitutional right of adequate housing and the corresponding ICESCR provision differed in a way, that the latter provided for more extensive guarantees. The Court employed the reasonableness test instead to assess whether the state's actions were reasonably sufficient in order to meet the constitutional obligation. The state was found in violation of its obligation to progressively realize the right.[80] However, this case has been severely criticized as it did not provide for an individual remedy.[81]

[76] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para. 12, available at: <https://www.refworld.org/pdfid/4538838d0.pdf> (accessed 15.6.2021).

[77] *Landau D.,* The Reality of Social Rights Enforcement, Harvard International Law Journal 1(53), 2012, pp. 207–209.

[78] *Chowdhury J.,* Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights – A Comparative Perspective, Cornell Law School Inter-University Graduate Student Conference Paper 27, 2009, p. 9, available at: <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1055&context=lps_clacp> (accessed 15.6.2021).

[79] Judgment of the Constitutional Court of South Africa of 4 October 2000 – *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2000 (11) BCLR 1169 (CC), case CCT11/00, available at: <https://collections.concourt.org.za/handle/20.500.12144/2107> (accessed 1.7.2021).

[80] *Boyle K.*, Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication, 2019, pp. 122-124.

[81] *Boyle K.,* Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication, 2019, p. 124; *Fuo O.,* In the Face of Judicial Deference: Taking the 'Minimum Core' of Socio-Economic Rights to the Local Government Sphere, Law, Democracy & Development 19, 2015, p. 1.

Beyond the substantive social rights, the Constitutional Court of Georgia can protect social rights via the right to equality. In this direction, the Court has a well-developed and promising case-law, but some deficiencies can also be identified, in particular when the case is assessed through the rational basis test. In this regard, the case concerning welfare and other benefits for the residents of high mountainous regions[82] should be mentioned. Arguably, the Court failed to acknowledge the full context, magnitude and implications for systemic inequality between citizens and non-citizens in this case.[83] To ensure that equality analysis factors in the full social and economic context, the Court can model its analysis in accordance with the theory of substantive equality. The advantage of this theory is the fact that it shifts the spotlight to the disadvantaged and aims to account for the full picture of inequality. Its core principle can be summed up as 'the basic principle that the right to equality should be located in the social context, responsive to those who are disadvantaged, demeaned, excluded, or ignored.'[84] The courts in South Africa, Canada and the UK have employed the substantive equality standard to decide on differentiation in matters of social nature.[85]

Finally, the case of *Tandashvili* has created a novel avenue for redress in social matters. In this sense, dignity is closely connected to substantive equality, restorative justice and equity, and guarantees the most basic elements of the right to an adequate standard of living. For example, the Constitutional Court of Germany applied the right to dignity (read together with the principle of the social state) to the subsistence minimum and elaborated that human dignity entails material conditions necessary for physical existence and minimum participation in social, cultural and political life.[86] Such progressive judicial interpretation of the right to dignity can facilitate the protection of the most basic social security and welfare rights that are absent from the Constitution of Georgia.

[82] Judgment of the Constitutional Court of Georgia of 7 December 2018 - *Citizens of the Republic of Armenia Garnik Varderesian, Artavazd Khachatrian and Ani Minasian v. the Parliament of Georgia* (N2/9/810, 927), available at: <https://constcourt.ge/ka/judicial-acts?legal=1174> (accessed 1.7.2021).

[83] *Arevadze N.,* Substantively Close, Legislatively Afar: Disparities between Citizens and Permanent Residents in Georgia, pp. 48–50.

[84] *Fredman S.,* Substantive Equality Revisited, International Journal of Constitutional Law 3(14), 2016, pp. 712–713.

[85] *Fredman S.,* Providing Equality: Substantive Equality and the Positive Duty to Provide, South African Journal on Human Rights, 2(21), 2005, pp. 163, 172–184.

[86] *Boyle K.,* Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication, 2019, p. 135.

V. CONCLUSION

Since the creation of the international human rights law, justiciability and enforceability of social rights have always been contentious conceptual and practical issues. Classical critiques that questioned, whether social rights constitute human rights, have long been addressed and refuted, and the views of non-justiciability of social rights are considered outdated.[87] However, the courts still face challenges while adjudicating on social rights and the central question remains undecided: what is the appropriate and necessary judicial interference into social policy and when does it become an overreach contrary to the separation of powers? Not knowing the answer, judicial institutions often adopt a cautious and deferential approach in the cases concerning social matters and, in particular, resource-intensive issues such as welfare benefits. The Constitutional Court of Georgia is not an exclusion from this general rule: it too has developed a restrained approach to social matters. The Court always emphasizes that the state enjoys wide discretion in social and economic policy-making and resource-allocation. However, the Court has also developed promising and progressive standards and has guaranteed social rights to the disadvantaged and vulnerable.

In light of the minimalist constitutional approach to social rights, the case-law of the Constitutional Court can serve as a foundation for future cases and interpretations that extensively protect the social rights and interests of the most disadvantaged. However, the Court will need to adopt a consistently bolder stance on social issues, examples of which have already been demonstrated in several cases discussed above. This will require a more standardized and comprehensive approach and the concepts and theories offered by this article can serve as points of departure. By interpreting substantive social rights in line with IHRL interpretations, adopting a substantive equality perspective and expanding the scope of the right to dignity, the Court will be able to overcome the challenges linked with justiciability of the social rights and take the constitutional practice of social rights protection to another level.

[87] *Boyle K.,* Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication, 2019, p. 18.

*Revaz Khoperia**

ACADEMIC FREEDOM AS A CONSTITUTIONALLY GUARANTEED RIGHT

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

ABSTRACT

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

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

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

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

I. INTRODUCTION

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

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

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

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

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

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

II. THE SIGNIFICANCE OF ACADEMIC FREEDOM

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

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

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

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

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

III. ACADEMIC FREEDOM IN THE FEDERAL REPUBLIC OF GERMANY

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

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

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

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

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

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

2. THE SCOPE AND THE SUBJECTS OF THE RIGHT

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

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

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

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

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

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

3. CASE LAW

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

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

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

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

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

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

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

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

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

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

IV. ACADEMIC FREEDOM IN THE U.S.

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

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

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

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

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

2. CASE LAW

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

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

2.1. Hazelwood School District v. Kuhlmeier

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

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

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

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

2.2. Pickering-Connick-Garcetti (PCG)

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

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

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

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

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

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

V. ACADEMIC FREEDOM IN GEORGIA

1. THE REGULATION PROVIDED BY THE CONSTITUTION

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

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

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

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

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

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

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

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

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

2. THE LEGISLATIVE GROUNDS FOR THE RESTRICTION OF ACADEMIC FREEDOM

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

2.1. The General Education Field

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

2.2. The Vocational Education Field

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

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

2.3. The Higher Education Field

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

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

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

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

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

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

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

2.4. The Regulation of the Quality of Education

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

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

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

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

VI. CONCLUSION

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

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

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

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

Ana Beridze[*]

THE RIGHT TO LIFE IN THE CONTEXT OF CLIMATE CHANGE

ABSTRACT

The Constitution of Georgia of 1921 did not directly guarantee environmental human rights (environmental issues gained particular importance only in the second part of the 20th century), however, it recognized the human being as the main value, and required the state to ensure the well-being of the people and their right to live with dignity. Nowadays, the main threat to the enjoyment of human rights are climate change-related environmental problems and risks. The rights to life, human dignity and environmental protection are now directly guaranteed by the Constitution of Georgia of 1995, which draws aspirations from the Constitution of Georgia of 1921. Thus, Georgia has the positive obligations to protect human health and life, guarantee environmental protection and ensure that people live with dignity in the context of climate change.

I. INTRODUCTION

Nowadays, there is almost a scientific consensus that modern climate change – global warming – is anthropogenic in nature.[1] This means that the rise in temperatures in Earth's atmosphere and oceans over the past 150 years has been primarily a result of human activities and the consequential greenhouse gas emissions in the atmosphere, which harm natural ecosystems and endanger human life and their dignified existence.[2]

Although the impact that climate change has on environment has not yet been studied in depth, it is already considered that the rise of sea levels, increase of drought and flood frequency, intense heatwaves, and other severe weather events are attributable to the global warming.[3] These negative changes in the climatic systems and the consequential natural disasters endanger human existence: they cause food security problems, livelihood loss, infrastructure damage, and restrict access to essential services including making access to electricity, water, sanitation, and health care difficult or impossible.[4]

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[1] *Oreskes N.*, The Scientific Consensus on Climate Change, Science 306 (5702), 2004, p. 1686.

[2] Intergovernmental Panel on Climate Change (IPCC), Climate Change 2014 Synthesis Report Summary for Policymakers, 2014, p. 2, available at: <https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf> (accessed 1.8.2021).

[3] *Field C. B. and others*, Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation: Special Report of the Intergovernmental Panel on Climate Change, 2012, pp. 167-203.

[4] Office of the United Nations High Commissioner for Human Rights (OHCHR), Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment, UN Doc A/74/161, 2019, para. 7, available at: <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/Report.pdf> (accessed 1.8.2021).

Generally, environmental problems, if not addressed promptly and effectively, can lead to the violation of fundamental human rights, such as the rights to life, health, water, food, property, religion, culture.[5] Therefore, climate change, which is considered as the 'number one threat to mankind'[6] is definitely one of the most serious obstacles to the protection and realization of these rights.[7]

If we directly focus on the right to life, nowadays, approximately 400 000 people die each year from extreme weather events related to global warming, malnutrition and diseases.[8] According to the World Health Organization, 250 000 additional deaths per year are expected to be attributable to climate change in the 2030s and 2050s.[9] These statistics show how important it is to mitigate and adapt to climate change in order to prevent its adverse effects on human health and life and protect people from premature death.

As for Georgia, the Climate change is already having a noticeable impact on Georgia.[10] It increases the frequency of natural events such as: drought, floods, mudflow, avalanche, and thus, it poses a great threat to the lives and development of people.[11] The most vulnerable sectors to these threats are agriculture, forestry, tourism, health and cultural heritage that are all in direct connection to the economic and social well-being, life and health of the people.[12] Hence, in order to protect the population and ensure their dignified existence, it is very important for Georgia to manage properly these risks and take all the necessary measures to adapt to the negative impacts of climate change and protect people from its adverse effects.

In these terms, the main aim of the following article is to determine, whether or not it is the Constitutional obligation of Georgia to guarantee the right to life specifically in the

[5] United Nations Environment Programme (UNEP), Factsheet on Human Rights and the Environment, 2015, available at: <https://wedocs.unep.org/bitstream/handle/20.500.11822/9933/factsheet-human-rights-environment.pdf?sequence=1&isAllowed> (accessed 1.8.2021).

[6] *Parry E. J.*, The Greatest Threat to Global Security: Climate Change Is Not Merely An Environmental Problem, available at: <https://www.un.org/en/chronicle/article/greatest-threat-global-security-climate-change-not-merely-environmental-problem> (accessed 20.4.2021).

[7] United Nations Environment Programme (UNEP), Climate Change and Human Rights, 2015, pp. 1-3, available at: <https://www.unep.org/resources/report/climate-change-and-human-rights> (accessed 20.4.2021).

[8] United Nations General Assembly (UNGA), Analytical Study on the Relationship between Climate Change and the Human Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Report of the Office of the United Nations High Commissioner for Human Rights (A/HRC/32/23), 2016, paras. 4, 8, available at: <https://digitallibrary.un.org/record/841798/?ln=en> (accessed 20.4.2021).

[9] World Health Organization (WHO), Quantitative risk assessment of the effects of climate change on selected causes of death, 2030s and 2050s, 2014, p. 1, available at: <https://apps.who.int/iris/bitstream/handle/10665/134014/9789241507691_eng.pdf?sequence=1&isAllowed=y> (accessed 31.3.2021).

[10] EU4Climate, Georgia, available at: <https://eu4climate.eu/georgia/> (accessed 31.3.2021).

[11] Climate Forum East (CFE) and Georgia National Network on Climate Change, National Climate Vulnerability Assessment: Georgia, 2014, available at: <https://climateforumeast.org/uploads/other/0/771.pdf> (accessed 31.3.2021).

[12] EU4Climate, Georgia, available at: <https://eu4climate.eu/georgia/> (accessed 31.3.2021).

climate change context and determine which other legal mechanisms people can use in order to require appropriate actions from the state. As climate change law and litigation is a new field to the whole world including Georgia, it needs long-term development. The article will generally assess this new legal regime in the international context and use the examples of other countries in this regard.

For these purposes, the article firstly explains briefly what the right to life is under the Constitution of Georgia and other international instruments, and what kind of obligations states generally may have in order to let people fully exercise it. Secondly, the article explores the United Nations Framework Convention on Climate Change (UNFCCC)[13] and the Paris Agreement,[14] to which Georgia is a signatory party, and assesses whether or not they obligate their member states to protect the right to life from the climate change impacts. The article also discusses what other legal instruments people can use in order to require governments to respond adequately to the climate change-related life threats. Thirdly, the article examines the relevant case law and illustrates, how the courts interpret the extents of state obligations to protect the fundamental human right to life under climate change regimes and how these decisions may influence the current legal and political orders of states, including that of Georgia. The fourth and the last part of the article draws conclusions about how the right to life is respected and protected under the existing climate change regimes and under the Constitution of Georgia and what kind of measures the governments, including the government of Georgia, have to take in order to fulfil their obligations to guarantee the proper enjoyment of this very basic human right.

II. THE RIGHT TO LIFE

The right to life is recognized as a fundamental human right by a number of international documents, most importantly, Article 3 of the Universal Declaration of Human Rights (the UDHR), which is considered as 'a milestone document' for human rights,[15] reads as follows: 'Everyone has the right to life, liberty and the security of person'.[16] After the establishment of the UDHR, the commitments made under it, were incorporated into different international or national legal documents, general principles, customs,

[13] United Nations Framework Convention on Climate Change (UNFCCC), available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf> (accessed 1.4.2021).
[14] Paris Agreement, available at: <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> (accessed 31.3.2021).
[15] Universal Declaration of Human Rights, available at: <https://www.un.org/sites/un2.un.org/files/udhr.pdf> (accessed 31.3.2021).
[16] Universal Declaration of Human Rights, Article 3, available at: <https://www.un.org/sites/un2.un.org/files/udhr.pdf> (accessed 31.3.2021).

etc., and the human rights, including the right to life, have become inseparable parts of modern legal systems.[17]

The right to life is guaranteed by the Article 10 of the Constitution of Georgia of 1995. According to the comments to this Article, the right to life is the most basic human right that should be guaranteed by the state and it is considered as a prerequisite for the enjoyment of other human rights.[18] This right is closely connected to human dignity, which is guaranteed by the Article 9 of the Constitution of Georgia of 1995, and was also guaranteed by the Constitution of Georgia of 1921.[19] This connection means that the state does not only have the obligation to guarantee the right to life, but it is also obliged to guarantee the right of a person to live with dignity. What this might mean in climate change regime, is well explained by the General Comment on the right to life under the International Covenant on Civil and Political Rights (the ICCPR),[20] to which Georgia is a signatory party as well.[21] Specifically, the obligation to protect the right to life under Covenant is not narrowly interpreted, i.e. only as the obligation of the state to protect a person's right not to be killed unlawfully by third parties.[22] Instead, it should be interpreted widely as the right of a person to live with dignity.[23] Pursuant to such an interpretation, the social and economic aspects of life are included within the scope of this article and states are required to take action in order to satisfy basic the human needs, that are crucial for a dignified life, such as food or shelter.[24] According to the explanation of the Committee, as the environmental problems caused by global

[17] United Nations (UN), The Foundation of International Human Rights Law, available at: <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law> (accessed 1.7.2021).

[18] *Gotsiridze E.,* The Right to life, in: *Burduli I., Gotsiridze E., Erkvania T., Zoidze T., Izoria L., Kobakhidze I., Loria A., Macharadze Z., Turava M., Phirtskhalashvili A., Putkaradze I., Kantaria B., Tsereteli D., Jorbenadze S.,* Commentary on the Constitution of Georgia, Chapter II, Citizenship of Georgia, Fundamental Human Rights and Freedoms, 2013, p. 72.

[19] 1921 Constitution of Georgia, Article 113, available at: <https://matsne.gov.ge/document/view/4801430?publication=0> (accessed 15.7.2021).

[20] International Covenant on Civil and Political Rights, Article 6(1), available at: <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en> (accessed 1.7.2021).

[21] United Nations Human Rights Committee (UNHRC), General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life (CCPR/C/GC/36), 2018, para. 2, available at: <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf> (accessed 1.4.2021).

[22] United Nations Human Rights Committee (UNHRC), General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life (CCPR/C/GC/36), 2018, para. 3, available at: <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf> (accessed 1.4.2021).

[23] United Nations Human Rights Committee (UNHRC), General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life (CCPR/C/GC/36), 2018, para. 3, available at: <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf> (accessed 1.4.2021).

[24] *Wicks E.,* The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties, Human Rights Law Review 12(199), 2012, p. 5.

warming directly impact social and economic the well-being of the people, affect their health and may deprive them of life, the right to life might be violated if climate change-related problems are not properly managed by states.[25]

In the Georgian context, the right to life and dignity should be interpreted in the very same way and in line with the Article 29 of the Constitution of Georgia, which specifically states that people are entitled to the rights to a healthy environment and the environmental protection. This does not only correspond to values of 1995 Georgia's Constitution but of 1921 Constitution as well. Although the latter did not include environmental human rights, it guaranteed many social rights, recognized the inviolability of human dignity and required the state to create the circumstances, in which the most basic human needs were satisfied.

To properly understand what is specifically required from the states, including Georgia, in order to guarantee the right to live with dignity in the context of climate change, it is important to explain firstly what kind of obligations states generally have for ensuring the enjoyment of human rights. These obligations can be grouped under different categories, namely the obligations to respect, protect, promote and fulfil human rights. The obligation to respect human rights entails the negative obligation of the state not to interfere with the enjoyment of these rights by those who are entitled to them.[26] In the context of the right to life, this means that the state bodies, authorities or servants shall not deliberately violate this right.

On the other hand, the states are also obligated to protect the enjoyment of human rights from the infringement by third persons, meaning that they have the positive obligation to do all that is possible in order to prevent such violations and react to them.[27] For the right to life, this means that the states shall enact such laws that guarantee the proper protection of the human life from theinterference from others[28] and put effective mechanisms for the implementation of these laws in place.[29] For the purposes of this article, it should me mentioned that this positive duty also

[25] United Nations Human Rights Committee (UNHRC), General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life (CCPR/C/GC/36), 2018, para. 30, available at: <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf> (accessed 1.4.2021).

[26] *Moeckli D., Shah S., Sivakumaran S.* (eds.), International Human Rights Law, 3rd edition, 2018, p. 97.

[27] *Tomuschat C.,* Human Rights: Tensions Between Negative and Positive Duties of States, Austrian Review of International and European Law 19 (14), 2013, pp. 19, 24.

[28] *Petersen N.,* Life, Right to, International Protection, Max Planck Encyclopedias of International Law, para. 2, available at: <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e841#> (accessed 31.3.2021).

[29] Office of the United Nations High Commissioner for Human Rights (OHCHR), Civil and Political Rights: The Human Rights Committee, Fact Sheet No.15 (Rev.1), 2005, p. 5, available at: <https://www.ohchr.org/documents/publications/factsheet15rev.1en.pdf> (accessed 1.4.2021).

implies the obligation of preventing environmental disasters that can affect the proper enjoyment of human rights.[30]

As for the obligations to promote and fulfil, they are also of positive character and require certain action from states. In order to meet the requirements of these obligations, the states shall create such circumstances, in which the realization of human rights is possible and realistic, for example, by providing effective enforcement mechanisms, by creating essential infrastructure, by rising public awareness about human rights issues, etc.[31]

To focus more on the topic of this article, the following parts of the article will specifically discuss the positive dimension of states' obligations with regards to ensuring the proper protection and enjoyment of the right to life in the context of climate change.

III. THE CLIMATE CHANGE REGIME AND THE RIGHT TO LIFE

The First Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) in 1990 called for immediate global action from the states in order to combat dangerous, man-made climate change and served as the trigger for the United Nations to establish the United Nations Framework Convention on Climate Change, to which Georgia is a signatory party as well.[32] This international agreement is the foundation of the global cooperation with regards to the mitigation and adaptation to climate change.[33] It established the general regime under which the 'ultimate objective' of the participating states is to keep 'greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.'[34]

Despite the fact that there is no direct reference to human rights in this Convention, it recognizes that climate change might have an adverse effect 'on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare' that are all directly connected to the enjoyment of the universally recognized human rights.[35] The fact itself, that the states decided to take action in order to tackle climate change and avoid its negative impacts on natural environment and people, might be considered as the first attempt from the states to fulfil their positive obligations to protect human health and life from

[30] *Moeckli D., Shah S., Sivakumaran S.* (eds.), International Human Rights Law, 3rd edition, 2018, p. 97.
[31] *Coomans F.,* The Ogoni Case Before The African Commission on Human and Peoples' Rights, International and Comparative Law Quarterly 52(3), 2003, pp. 749, 753.
[32] *Peake S., Smith J.,* Climate Change: From Science to sustainability, 2nd edition, 2009, p. 102.
[33] United Nations Framework Convention on Climate Change (UNFCCC), available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf> (accessed 1.4.2021).
[34] United Nations Framework Convention on Climate Change (UNFCCC), Article 3, available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf> (accessed 1.4.2021).
[35] United Nations Framework Convention on Climate Change (UNFCCC), Article 1(1), available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf> (accessed 1.4.2021).

climate change-related environmental threats under different human rights instruments. It is true that the right to a healthy environment is not explicitly recognized as the universal human right, but it is not doubtful anymore that the environmental protection is one of the most important aspects of the proper enjoyment of a number of basic human rights, for example, the rights to health and life.[36]

Thus, it can be concluded that the adverse effects of climate change, which is recognized as the most dangerous environmental problem that the humankind has ever faced,[37] have to be prevented in order to guarantee the proper enjoyment of these fundamental human rights and that the states have the positive obligation to protect the natural environment and people from global warming-associated harms and to create the circumstances that are essential for the realization of the basic human rights.[38] This obligation is more clear in the Georgian context, as the Constitution of Georgia of 1995 explicitly recognizes the rights to a healthy environment and environmental protection.

In the international context, the first explicit reference to human rights under the climate change regime was made in the Cancun Agreements, a decision adopted at the 16th Session of the Conference of the Parties to the UNFCCC (COP 16).[39] Specifically, one of the preambular recitals of this decision refers to the Resolution 10/4 of the United Nations Human Rights Council on human rights and climate change and by this reference it recognizes that climate change adversely affects the effective enjoyment of human rights, especially by vulnerable people.[40] However, in the paragraph 8 the decision only notes that the human rights should be respected in climate change-related action, and it says absolutely nothing about the positive obligations of the states to protect, promote and fulfil these rights.[41] Despite this fact, this decision is still very important, as it was the first attempt from the states to link human rights and climate change concerns together.[42]

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[36] *Carlarne C. P., Gray K. R., Tarasofsky R. G.,* The Oxford Handbook of International Climate Change Law, 2016, pp. 216-217.

[37] United Nations Environment Programme (UNEP), Responding to Climate Change, available at: <https://www.unenvironment.org/regions/europe/regional-initiatives/responding-climate-change> (accessed 26.4.2021).

[38] Office of the United Nations High Commissioner for Human Rights (OHCHR), Understanding Human Rights and Climate Change, 2015, p. 7, available at: <https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf> (accessed 31.3.2021).

[39] Office of the United Nations High Commissioner for Human Rights (OHCHR), Integrating Human Rights at the UNFCCC, available at: <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/UNFCCC.aspx> (accessed 31.3.2021).

[40] The Cancun Agreements: Outcome of the work of the ad hoc Working Group on Long-term Cooperative Action under the Convention, 2011, Recital 7, available at: <https://undocs.org/FCCC/CP/2010/7/Add.1> (accessed 31.3.2021).

[41] The Cancun Agreements: Outcome of the work of the ad hoc Working Group on Long-term Cooperative Action under the Convention, 2011, para. 8, available at: <https://undocs.org/FCCC/CP/2010/7/Add.1> (accessed 31.3.2021).

[42] Centre for International Environmental Law (CIEL), Analysis of Human Rights Language in the Cancun

In light of the rising awareness and frequent discussions around climate change and human rights issues, the Paris Agreement, to which Georgia is a signatory party as well, directly underlined the importance of taking human rights obligations by the states into consideration, while elaborating and implementing the climate change action policies.[43] It used the terms 'respect, promote and consider' and, again, said nothing about the protection and fulfilment of them.[44] According to the text of the respective recital, the Paris Agreement has merely referred to the already existing human rights obligations of the states under different human rights instruments and explained that their response measures to climate change should not interfere with the enjoyment of these rights.[45] This means that this Agreement does not impose the positive obligation on the states to protect human rights from climate change threats themselves. However, it still can serve as a incentive for the states for further cooperation in this regard, which may result in the inclusion of human rights-based approach in international treaties and agendas for combating climate change in the future.[46]

In this regard, the United Nations High Commissioner for Human Rights has already called for the member states to the Paris Agreement to adopt the Nationally Determined Contributions (NDCs) and set the ambitious climate change mitigation and adaptation goals in line with the fundamental human rights obligations to respect, protect and fulfil them and, in this way, save people's lives, protect their health and guarantee their welfare.[47]

As it can be seen, the existing international climate change regime does not directly impose positive obligations on the states to protect the right to life from climate change threats. Both the UNFCCC and the Paris Agreement use a bottom-up approach and allow the member states to define the exact scope of their obligations through their NDCs in order to balance their economic, social and environmental interests and decide themselves what they are going to do in order to mitigate and adapt to climate change;

However, the abovementioned does not automatically mean that the states do not have positive obligations at all to protect the right to life in the climate change context. The obligation of the states to respect and protect this right can be found in the human

Agreements, (UNFCCC 16th Session of the Conference of the Parties), 2011, p. 2, available at: <https://www.ciel.org/wp-content/uploads/2014/11/HR_Language_COP16_Mar11.pdf> (accessed 31.3.2021).

[43] Paris Agreement, Recital 11, available at: <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> (accessed 31.3.2021).

[44] Paris Agreement, Recital 11, available at: <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> (accessed 31.3.2021).

[45] *Bodansky D., Brunnee J., Rajamani L.,* International Climate Change Law, 2017, p. 228.

[46] *Bodansky D., Brunnee J., Rajamani L.,* International Climate Change Law, 2017, p. 228.

[47] *Bachelet M.,* Letter from the United Nations High Commissioner for Human Rights on Integrating Human Rights in Climate Action, 2018, available at: <https://www.ohchr.org/EN/Issues/Health/Pages/OpenLetters.aspx> (accessed 31.3.2021).

rights instruments, and since the right to life also entails the right to be protected from environmental threats, the governments can be found in the breach of this fundamental human right, if they do not take appropriate measures to mitigate climate change or adapt to it.[48] There are many obstacles in practice that need to be overcome in order to use the human rights law in the climate change context. For example, it is often difficult to substantiate the cause and effect that would prove that the environmental harms and the loss of human lives are caused by the climate change and the resulting natural disasters and threats. However, the use of different human rights documents can still beneficial at the initial state, as it can enable people to protect their rights and facilitate the courts to develop corresponding case-law, which can later serve as the legal basis for the states in the process of establishing and developing specific climate change laws and help them create effective legal instruments for the protection of fundamental human rights in the context of climate change.[49]

In this regard, the following part of the article will further demonstrate how the human rights law and the constitutional obligations of the countries can be used for requiring the states to take action in order to fullfil their positive obligations and protect the right to life from global warming- related risks. For these purposes some important decisions made by foreign courts in connection with climate change will be explored and discussed in the article.

It should be mentioned that the following examples can be effectively used in the Georgian context, where the Constitution of Georgia directly requires the state to guarantee the right to a healthy environment, to protect the people's lives and to ensure that people live with dignity.

IV. CLIMATE CHANGE LITIGATION AND HUMAN RIGHTS LAW

Generally, the courts have an important role in combating climate change as they have the power to find and interpret laws that are applicable to a particular case; they can find the state in the breach of different obligations in the climate change context, make them responsible for the respective consequences and order them to take appropriate measures to mitigate and adapt to it; they set legal precedents and help to develop climate change legislation.[50]

[48] *Sinder A.,* An Emerging Human Right to Security from Climate Change: The Case Against Gas Flaring in Nigeria, in: *Burns W. G. G., Osofsky H. M.* (eds.), Adjudicating Climate Change: State, National, and International Approaches, 2009, p. 185.

[49] *Carlarne C. P., Gray K. R., Tarasofsky R. G.,* The Oxford Handbook of International Climate Change Law, 2016, p. 224.

[50] *Preston B. J.,* The Contribution of the Courts in Tackling Climate Change, Journal of Environmental Law 28(11), 2016, pp. 11-17.

The most recent example of an effective participation of the courts in tackling climate change problems, is the decision made by the Supreme Court of the Netherlands in the case *Urgenda Foundation v. The State of the Netherlands*.[51] It is considered as a landmark decision, because the Court ruled that the state, specifically the Netherlands, has positive obligations to ensure the protection of human rights under its Constitution and the international human rights instruments in the context of climate change.[52] Namely, the Court recognized that climate change 'can have a severe impact on the lives and welfare of the residents of the Netherlands' and found that the state has positive obligations to prevent 'dangerous climate change', and to ensure the proper enjoyment of the right to life and the right to private and family life by its citizens under the Articles 2 and 8 of the European Convention on Human Rights, respectively.[53] It stated that the Netherlands' efforts to mitigate climate change were not sufficient and in accordance with its human rights obligations, and obliged the state to achieve at least 25% reduction target in its greenhouse gas emissions by 2020, compared to the 1990's levels.[54]

Despite the fact that the Court based its decision on the human rights law, it also used the UNFCCC and the Paris Agreement, as well as the existing scientific evidence in regard to the possible impacts of climate change on the natural environment and the people, for the interpretation of the right to life in climate change context and the definition of the exact scope of the state's positive obligations, concerning the reduction of its carbon footage and the protection of people's lives by the state.

The human rights law was also effectively used in the decision made by the Supreme Court of Justice of Columbia in the case *Future Generations v. Ministry of the Environment*.[55] Particularly, the Court stated that the climate change gradually depletes the life and interferes with the right to live with dignity, as it deprives the present and future generations the access to fresh air, water and clean environment. The Court found

[51] Judgment of the Supreme Court of the Netherlands of 20 December 2019 - *The State of the Netherlands v. Urgenda Foundation* (19/00135, ECLI:NL:HR:2019:2006), available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007> (accessed 31.3.2021).

[52] Office of the United Nations High Commissioner for Human Rights (OHCHR), Bachelet Welcomes Top Court's Landmark Decision to Protect Human Rights from Climate Change, 2019, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25450&LangID=E> (accessed 31.3.2021).

[53] Judgment of the Supreme Court of the Netherlands of 20 December 2019 - *The State of the Netherlands v. Urgenda Foundation* (19/00135, ECLI:NL:HR:2019:2006), para. 6, available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007> (accessed 31.3.2021).

[54] Judgment of the Supreme Court of the Netherlands of 20 December 2019 - *The State of the Netherlands v. Urgenda Foundation* (19/00135, ECLI:NL:HR:2019:2006), para. 7.5.1., available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007> (accessed 31.3.2021).

[55] Decision of the Supreme Court of Justice of Columbia of 5 April 2018 - *Future Generations v. The Ministry of the Environment* (STC4360-2018), available at: <https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/> (accessed 31.3.2021).

that the efforts of the state to mitigate climate change were not sufficient, as it allowed to continue the deforestation in the Amazon region that is in direct connection with the increasing concentrations of the carbon dioxide in the atmosphere. It found that the state has positive obligations to elaborate and implement appropriate policies and take sufficient efforts to protect the Amazon rainforest in order to guarantee the full enjoyment of people's rights.

As it can be seen, there some important developments have already been made through the climate change litigation and states have directly been imposed with the obligation to prevent climate change threats and protect human life. Despite the fact that it is still very difficult to find the causal and effect relationship between particular harms to people and the climate change phenomenon, the abovementioned decisions are actual examples of how the courts can draw conclusions based at least on: existing scientific knowledge about the possible impacts of global warming on natural environment, general commitments made by the states under different climate change instruments, their human rights obligations under international treaties or national laws, or different legal principles, including (but not limited to) the precautionary or the preventive principles.

The obligation of the states to protect the right to life might be more apparent and easier to establish in the context of the adaptation to climate change rather than the mitigation process.[56] As already mentioned, the world, including Georgia, is already facing the results of the rising temperatures in the Earth's atmosphere and many people are already affected by the rising sea-levels or extreme weather events. Thus, the role of the state gets more and more important in the process of helping people rearrange their lifestyles and adapt to these changes, for example, by developing flood defence systems or by providing drought-resistant crops.[57]

Article 7 of the Paris Agreement obliges the states to elaborate and implement adaptation action plans[58] and recognizes that the adaptation to climate change is a global challenge and appropriate measures are to be taken in order to contribute to the protection of people, especially, of those who are the most vulnerable to the adverse effects of global warming.[59] It is true that the Paris Agreement leaves space for the states to decide

[56] *Hall M. J., Weiss D. C.*, Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law, The Yale Journal of International Law 37(309), 2012, pp. 345-346.

[57] United Nations Framework Convention on Climate Change (UNFCCC), What Do Adaptation to Climate Change and Climate Resilience Mean?, available at: <https://unfccc.int/topics/adaptation-and-resilience/the-big-picture/what-do-adaptation-to-climate-change-and-climate-resilience-mean> (accessed 31.3.2021).

[58] Paris Agreement, Article 7(9), available at: <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> (accessed 31.3.2021).

[59] Paris Agreement, Article 7(2), available at: <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> (accessed 31.3.2021).

themselves what to do in this regard specifically,[60] however, the inaction or inappropriate action from the states might result in the violations of the basic human rights, including, that of the right to life,[61] and, thus, it is the human rights law that might be effectively used to oblige states to take appropriate measures.[62]

For example, in the case *Ashgar Leghari v. Federation of Pakistan* the Lahore High Court ruled that Pakistan had the positive obligation to elaborate and implement a climate change adaptation plan under the Articles 9 and 14 of its Constitution in order to guarantee the full enjoyment of the right to life (that also entails the right to a clean environment) and the right to human dignity.[63] It found that the increasing floods and droughts that create risks to food and water security are attributable to climate change[64] and ordered the state to start implementing its National Climate Change Policy and the Framework for the Implementation of the Climate Change Policy immediately.[65] The requirements set by the Constitution of Georgia can also be used in the very same way to require the state to take appropriate measures and guarantee the right to life and the right to live with dignity.

As can be observed, the courts and the climate change litigation play an important role in the development of the climate change law and contribute to the incorporation of human rights-based approach within it. More and more cases are now taken before different courts and tribunals, which set valuable precedents and find the states in the breach of fundamental human rights, including the right to life, because of the insufficient efforts of the states to mitigate and adapt to climate change.

The aforementioned mechanisms can also be effectively used in Georgia, since the Constitution of Georgia explicitly obliges the state undertake appropriate measures in order to guarantee the right to life and to ensure the environmental protection of the people.

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[60] *Bodansky D., Brunnee J., Rajamani L.,* International Climate Change Law, 2017, pp. 237-238.

[61] *McInerney-Lankford S.,* Climate Change and Human Rights: An Introduction to Legal Issues, Harvard Environmental Law Review 33(2), 2016, pp. 431, 436.

[62] *Carlarne C. P., Gray K. R., Tarasofsky R. G.,* The Oxford Handbook of International Climate Change Law, 2016, pp. 227-229.

[63] Decision of the Lahore High Court of 14 September 2015 - *Ashgar Leghari v. Federation of Pakistan*, (W.P. No. 25501/2015), paras. 12-13, available at: <http://climatecasechart.com/climate-change-litigation/non-us-case/ashgar-leghari-v-federation-of-pakistan/> (accessed 31.3.2021).

[64] Decision of the Lahore High Court of 14 September 2015 - *Ashgar Leghari v. Federation of Pakistan*, (W.P. No. 25501/2015), para. 11, available at: <http://climatecasechart.com/climate-change-litigation/non-us-case/ashgar-leghari-v-federation-of-pakistan/> (accessed 31.3.2021).

[65] Decision of the Lahore High Court of 14 September 2015 - *Ashgar Leghari v. Federation of Pakistan*, (W.P. No. 25501/2015), para. 13, available at: <http://climatecasechart.com/climate-change-litigation/non-us-case/ashgar-leghari-v-federation-of-pakistan/> (accessed 31.3.2021).

V. CONCLUSION

'Climate change is the defining issue of our time – and we are at a defining moment', said the UN Secretary General and there is no solid ground today to doubt these words.[66] Modern societies, especially the most vulnerable people, already face the adverse effects of the global warming. International climate change agreements have almost universal participation of states and all of the states agree that it is time for effective global cooperation in order to mitigate and adapt to climate change. On the one hand, it is true that the states exercise discretionary powers under the existing climate change regime and can decide themselves how they are going to contribute to the 'ultimate objective' of combating the global warming problem, but on the other hand, the human rights law enables people to require effective action from them in order to protect their basic human rights.

According to the different decisions, made by the courts in climate change-related cases, states have the positive obligation to protect the right to life from climate change threats under different human rights instruments. The courts have stated that the environmental degradation caused by the global warming phenomenon directly affects the fundamental human right to life and they recognize that it is the obligation of the state to elaborate and implement appropriate climate change action plans, to prevent the adverse effects of global warming on the natural environment and humans, and help those people who already experience its negative consequences. However, the existing climate change regime still needs to be developed and needs to explicitly include a human rights-based approach in order to directly oblige the states to protect the right to life from global warming threats and make climate change laws more effective and easier to enforce.

As for Georgia, its present Constitution, which draws aspirations from the 1921 Constitution, directly guarantees the rights to life, human dignity and environmental protection. Thus, it can be effectively used in the context of climate change and it may play an important role in requiring the Georgian Government to take appropriate measures to adapt to the negative impacts of climate change in order to ensure and protect the life, health and well-being of the people.

[66] United Nations General Assembly (UNGA), Secretary-General's Remarks on Climate Change, 2018, available at: <https://www.un.org/sg/en/content/sg/statement/2018-09-10/secretary-generals-remarks-climate-change-delivered> (accessed 31.3.2021).

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CONSTITUTIONAL MEMORY: DID THE LEGISLATOR FORGET THE WAY PAVED FOR HUMAN RIGHTS BY ARTICLE 45 OF THE 1921 CONSTITUTION OF GEORGIA?!

ABSTRACT

The 1921 Constitution of Georgia supported through the content of Article 45 the idea that the rights explicitly enumerated in the Constitution are not exhaustive and final and that the enumeration of some rights does not deny or disparage the existence of other rights. Such a clause can be compared to the outcome of the 'fear and acceptance' concept by *András Sajó*. In a system, where the building of democracy does not have a long history, there is always this fear that the state will try to find a leeway out of the human rights structures. The rationale behind the Ninth Amendment of the US Constitution was exactly the fear of the Founding Fathers, that the rights enlisted in the Constitution could diminish the scale of human rights protection in the future.

The present academic article aims to elucidate the question, whether transferring Article 39 of the 1995 Constitution (the version prior to 16 December 2018), which was the legal successor of Article 45 of 1921 Constitution, from the Second Chapter to the First Chapter diminished the substantive and procedural safeguards for the protection of rights. To answer this question, this article reviews the meaning and the case law regarding the Ninth Amendment of the US Constitution, as well as the case law of the Constitutional Court of Georgia in relation to Article 39. The present article also reviews Article 35 (formerly Article 45) in the light of the 'living constitution' mechanism. As a conclusion, the article summarizes the question, whether the legislator defied the legacy of Article 45 of the 1921 Constitution with the constitutional amendments of 2018.

I. INTRODUCTION

The chronicles of Georgian constitutionalism show that the 1921 Constitution played a groundbreaking role at every crucial stage, as it was obvious that every government

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had an aspiration to found its own legitimacy on the 1921 Constitution.[1] Looking at the historical notes related to the 1921 Constitution, we see that the Georgian constitutionalists paid particular attention to the western legal doctrines.[2] In addition to other evidences, this fact is also proved by the following words of the member of the Constituent Assembly and the State Constitutional Commission of Georgia, lawyer *Giorgi Gvazava*, delivered before the Constituent Assembly: 'We have the huge experience of various nations and enormous materials, we need a guiding idea, we need to find our way to get through these enormous materials [...] the existence of the state itself may be justified only as much as it provides safeguard for personal liberty. [...] the modern states of Europe and America are rights-based states.'[3]

The 1921 Constitution of the Democratic Republic of Georgia supported through the text of Article 45 one of the cornerstones of a rights-based state, stating that the rights explicitly enumerated in the Constitution are not exhaustive and final, and that the enumeration of certain rights does not deny or disparage the existence of other rights. It should be taken into consideration that this Article also served as a foundation for the text of the 1995 Constitution of Georgia and it was in force as Article 39 in the human rights chapter (Second Chapter of the Constitution) in the version of Constitution prior to 16 December 2018. This provision can be compared to the outcome of the 'fear and acceptance' concept by *András Sajó*. In a system, where the building of democracy does not have a long history, there is this constant fear that the state will try to find the leeway out of human rights structures. The rationale behind the Ninth Amendment of the US Constitution was exactly the fear of a part of the Founding Fathers, that the rights enlisted in the Constitution could diminish the scale of human rights protection in the future.

The present academic article aims to elucidate the question, whether transferring Article 39 of the 1995 Constitution (the version prior to 16 December 2018), which was the legal successor of Article 45 of 1921 Constitution, from the Second Chapter to the First Chapter diminished the substantive and procedural safeguards for the protection of rights. To answer this question, this article reviews the meaning and case law regarding the Ninth Amendment of the US Constitution, as well as the case law of the Constitutional Court of Georgia on Article 39. As a conclusion, the article summarizes the question, whether the legislator defied the legacy of Article 45 of the 1921 Constitution with the constitutional amendments of 2018.

[1] *Gegenava D.* (ed.), Constitutional Law of Georgia, 2014, p. 52 (in Georgian).
[2] *Gegenava D.*, European Foundations of Georgian Constitutionalism: The Struggle for the State of Law, International Interdisciplinary Conference, European Values and Identity, Speeches, 2014, p. 119 (in Georgian).
[3] *Gvazava G.*, Speech Delivered at the Constituent Assembly (Evening Sitting of 1 December), in: *Kordzadze Z.*, *Nemsitsveridze T.* (ed.), Chronicles of Georgian Constitutionalism, 2016, p. 130 (in Georgian).

II. ARTICLE 45 OF THE 1921 CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF GEORGIA – ITS MEANING AND HISTORICAL ANALYSIS

The 1921 Constitution of the Democratic Republic of Georgia was a clearly innovative and progressive political and legal document in the world constitutional order of its time. The founders paid particular attention to the fundamental human rights together with the form of government.[4] The basic law was aligned with the main line and values of the constitutions of the following epochs, and, most importantly, it entrenched the human being as the supreme idea, which is the cornerstone of the evaluation system of any developed, democratic state of law.[5] 'It is clear from the spirit of the 1921 Constitution, that its authors aspired to establish a 'rights-based state' through its adoption, where traditional human and citizen rights are based on the principle of personal liberty.'[6]

Besides establishing guarantees for specific rights in the text of the Constitution, the 1921 Constitution also foresaw that certain legally protected goods may have been left beyond the system of constitutional legal protection, in case they did not fall explicitly within the scopes of the rights protected by the Constitution, even if, they were essentially emanated from the basic principles recognized by the Constitution.[7] This approach is an example of a practical emanation of fundamental principles, which served a somewhat complementary function in the Constitution.[8]

More specifically, Article 45 of the 1921 Georgian Constitution stated, that 'The guarantees enumerated in the Constitution do not deny other guarantees and rights, which are not mentioned here, but derive inherently from the principles recognized by the Constitution.' There is a consideration, that, since the founders were familiar with the experience of the US-American and European constitutionalism, they formulated Article 45 as an analog of the Ninth Amendment of the US Constitution.[9]

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[4] *Gegenava D.*, European Foundations of Georgian Constitutionalism: The Struggle for the State of Law, International Interdisciplinary Conference, European Values and Identity, Speeches, 2014, p. 122 (in Georgian).

[5] *Demetrashvli A.*, The Constitution of 21 February 1921 of Georgia from the Perspective of 2011, in: 'At the Beginnings of Georgian Constitutionalism - 90th Anniversary of the 1921 Constitution of Georgia', 2011, p. 12 (in Georgian); *Gegenava D.*, International Interdisciplinary Conference, European Values and Identity, Speeches, p. 119 (in Georgian).

[6] *Papuashvili G.*, 1921 Constitution of the Democratic Republic of Georgia: Looking Back After Ninety Years, in: '1921 Constitution of the Democratic Republic of Georgia', 2011, p. 20 (in Georgian); *Gonashvili V.*, *Eremadze K.*, *Tevdorashvili G.*, *Kakhiani G.*, *Kverenchkhiladze G.*, *Chigladze N.*, Introduction to the Constitutional Law, 2017, p. 34 (in Georgian).

[7] *Gonashvili V.*, *Eremadze K.*, *Tevdorashvili G.*, *Kakhiani G.*, *Kverenchkhiladze G.*, *Chigladze N.*, Introduction to the Constitutional Law, 2017, p. 34 (in Georgian).

[8] *Gonashvili V.*, *Eremadze K.*, *Tevdorashvili G.*, *Kakhiani G.*, *Kverenchkhiladze G.*, *Chigladze N.*, Introduction to the Constitutional Law, 2017, p. 33 (in Georgian).

[9] *Putkaradze N.*, Fundamental Human Rights Provided by the Constitution of 21 February 1921, in: 'At the

III. THE NINTH AMENDMENT OF THE US CONSTITUTION – THE FUNCTION AND ROLE IN THE DEVELOPMENT OF THE FUNDAMENTAL HUMAN RIGHTS LAW

1. A BRIEF HISTORICAL REVIEW OF THE ADOPTION OF THE NINTH AMENDMENT

In 1791, during the ratification debates of the US Constitution, the two factions – the Federalists and the Anti-Federalists debated whether a bill of rights should become a part of the Constitution. The Federalists supported the ratification of the US Constitution and were against the inclusion of a bill of rights in the Constitution. In contrast to them, the Anti-Federalists were willing to agree to the ratification of the Constitution, but only in case it would include the bill of rights.[10]

More specifically, the Anti-Federalists considered, that without the bill of rights it was possible to read the Constitution in a way, that would give the federal government unlimited power. Federalists provided three arguments to counter the Anti-Federalists: 1. They argued that the Constitution established the federal government as a government with limited, delegated power and therefore, there was no need of a bill of rights in the first place, since the Congress was not empowered to violate the rights that were subject of concern for the Anti-Federalists; 2. They argued that it was dangerous to include the bill of rights in the Constitution, as it could indirectly grant the state the right to interfere with a specific right, for example: an amendment, which would protect the freedom of the press under certain conditions, could at the same time imply the general federal power to regulate newspapers under the conditions unforeseen by the amendment: 3. They argued that any list of rights would be incomplete and an enumeration of rights could imply that other rights beyond the list were not worthy of protection.[11]

During the debates on the bill of rights, the question was raised, whether it was possible to discover such significant rights along with progress, the existence of which were not imagined at that time.[12] In response to this question, *inter alia*, the following information can be read in the annals of the US Congress: *James Madison* wrote to *Thomas Jefferson*, that the inclusion of a bill of rights in the Constitution would disparage/negate other rights, which were not enumerated. However, he also

Beginnings of Georgian Constitutionalism - 90th Anniversary of the 1921 Constitution of Georgia', 2011, p. 58 (in Georgian); *Gegenava D.*, *Javakhishvili P.*, Article 39 of the Constitution: The IDP Norm Waiting for Asylum and Phenomenon of Fear of Unknown in Georgian Constitutionalism, Academic Herald, Special Issue, Legal, Political and Economic Aspects of Revision of the Georgian Constitution, 2017, p. 144 (in Georgian).

[10] *Wachtler S.*, Judging the Ninth Amendment, Fordham Law Review 59, 1991, p. 600.

[11] *Seidman L. M.*, Our Unsettled Ninth Amendment: An Essay on Unenumerated Rights and the Impossibility of Textualism, Georgetown Law Faculty Working Papers, 2010, pp. 134-135.

[12] Annals of Congress of the United States, 1789, available at: <https://memory.loc.gov/ammem/amlaw/lwaclink.html> (accessed 15.7.2021).

stated that it was possible to protect against this situation.[13] *James Madison* was referring to the Ninth Amendment here.[14]

The Congress proposed the Ninth Amendment to the Constitution in 1789 and its final text reads as follows: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'[15] The Ninth Amendment in turn was determined by the early opinion of *James Wilson*, according to which 'everything that is not enumerated is presumed to be given. The consequence is that an imperfect enumeration would throw all implied power into the scale of government; and the rights of the people would be rendered incomplete.'[16]

2. SCHOLARLY OPINION ON THE NINTH AMENDMENT – THE MEANING OF 'RETAINED RIGHTS'

Despite the fact that the Ninth Amendment refers to the existence of other rights which are not explicitly enlisted in the Constitution, it does not provide any guidance to ascertain, what exactly these additional rights are or how they can be strengthened and enforced.[17] The scholars tried to develop several theories in order to clarify what is meant under the term 'retained rights'. They mostly applied the historical method of interpretation, though other methods were used as well.

Starting the review from the oldest interpretation, the author of the commentary on the US Constitution published in 1833, *Joseph Story,* thought that the function of the Ninth Amendment is to promote the interpretation of the other parts of the Constitution, particularly that of the first eight Amendments. In the view of another author, it can be inferred from this argument, that the Ninth Amendment itself does not stipulate any individual rights. The same approach was taken by another constitutional law scholar, *Thomas Cool*, who disregards the Ninth Amendment altogether.[18]

[13] Annals of Congress of the United States, 1789, available at: <https://memory.loc.gov/ammem/amlaw/lwaclink.html> (accessed 15.7.2021).
[14] *Wachtler S.*, Judging the Ninth Amendment, Fordham Law Review 59, 1991, p. 604.
[15] The Ninth Amendment, US Constitution, Ratified in December 1791 (The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people), available at: <https://constitution.congress.gov/constitution/amendment-9/> (accessed 15.7.2021).
[16] *Massey C. R.*, The Natural Law Component of the Ninth Amendment, University of Cincinnati Law Review 49, 1992, p. 85.
[17] *Jackson J. D.*, Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights, Oklahoma Law Review 62, 2010, p. 168.
[18] *Ringold A. F.*, The History of the Enactment of the Ninth Amendment and Its Recent Development, Tulsa Law Review 8, 2013, p. 10.

2.1. The Ninth Amendment and Natural Rights

Based on the historical materials of the drafting and adoption of the Ninth Amendment, *Randy Barnett* argued and supported the theory that the original interpretation of the Ninth Amendment aimed to establish the individual natural rights model and to support the federalism model as well, which protects individual natural rights through the strict limitation of federal power.[19] Therefore, the term 'retained rights' mentioned in the Ninth Amendment does not mean the collective rights of people, as the citizens of the States; it has personal character and belongs to human beings as individuals.[20] Thus, the 'retained rights' have the same character as other rights and fundamental freedoms, which are entrenched by the Bill of Rights and are recognized by the Supreme Court.[21]

A part of the scholars also thinks that the 'retained rights' are genuinely natural rights, which are nurtured from such theoretical works on natural rights, like the works of *John Locke*.[22] For example, *Mark Niles* considered the Ninth Amendment to be based on the teaching of *John Locke* and argued that it was about personal liberty and autonomy. The Ninth Amendment enshrines the right to act freely to the extent that the actions do not harm others or the society *in toto*. The Ninth Amendment provides a right to be free from the illegitimate interference of the government, which aims to restrict personal liberty for any reason (other than the protection of the social/public good).[23]

Jeffrey Jackson thinks that the 'retained rights' enshrined by the Ninth Amendment are individual rights. However, he develops an opinion, that although the Founders might have considered the 'retained rights' as 'natural rights', in view of the fact that they were already existing, these rights were not 'theoretical or philosophical rights' stemming from the works of the theoreticians of natural law. In the view of the Founders, these rights stemmed from English constitutional law, common law and tradition. *Jeffrey Jackson* believes that 'retained rights' are those rights, which the Founders thought they inherited from the English constitutional and common law, naturally, with significant modifications emanating from the experience of the American colonists. Furthermore, the majority of the Founders were not familiar with the works of *John Locke* and other natural law scholars or common law

[19] *Barnett R. E.*, The Ninth Amendment: It Means What It Says, Texas Law Review 85, 2006, pp. 79-80.
[20] *Barnett R. E.*, The Ninth Amendment: It Means What It Says, Texas Law Review 85, 2006, pp. 79-80.
Jackson J. D., Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights, Oklahoma Law Review 62, 2010, pp. 168-169.
[21] *Jackson J. D.*, Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights, Oklahoma Law Review 62, 2010, pp. 168-169.
[22] *Jackson J. D.*, Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights, Oklahoma Law Review 62, 2010, p. 170; *McConnell M. W.*, The Ninth Amendment in Light of Text and History, Stanford Public Law Working Paper No. 1678203, 2010, p. 15.
[23] *Niles M.*, Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights, UCLA Law Review 83, 85, 2000, p. 122.

judgments of *Lord Coke*, however, they were informed about the commentaries on the common law, written by *Sir William Blackstone*.[24]

2.2. The Ninth Amendment – No Individual Rights

The second group of scholars opposes the idea that the Ninth Amendment entrenched individual rights. For example, *Kurt Lash* asserts that the Ninth Amendment provides no individual rights; instead, it establishes the collective rights of the States. In particular, these scholars argue, that if it is presumed that the Ninth Amendment is about individual rights, while the Tenth Amendment deals with the governmental power ('The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people'[25]), the State Conventions disappear from the viewpoint as the predecessors of the Ninth Amendment. This group of scholars argues that none of the drafts of the Ninth Amendment proposed by the State Conventions used the 'rights language'.[26] Instead, the State Conventions offered a rule to restrict the construction of federal powers.[27]

2.3. The Ninth Amendment and International Law

Daniel Farber thinks that the Founders might have been inspired by the works of the then-renowned classic theorist of International Law *Emer de Vattel*.[28] He develops a theory, according to which the Ninth Amendment sort of opens the door for the purposes of basing court decisions on International Law. In his opinion, the rights enshrined in International Law, which are not explicitly enumerated in the Constitution, could be implied under the Ninth Amendment.[29]

Kurt Lash also shares the opinion, that the International Law of that time influenced the drafting of the Ninth Amendment, however, he offers a different explanation.

[24] *Jackson J. D.*, Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights, Oklahoma Law Review 62, 2010, pp. 171-172, 222.

[25] The Tenth Amendment, U.S. Constitution, Ratified in December 1791 (The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.), available at: <https://constitution.congress.gov/constitution/amendment-10/> (accessed 1.5.2021).

[26] *Lash K.*, The Lost Original Meaning of the Ninth Amendment, Texas Law Review 83, 331, 2004, p. 423.

[27] *Lash K.*, The Lost Original Meaning of the Ninth Amendment, Texas Law Review 83, 331, 2004, p. 423; *Lash K.*, The Lost Jurisprudence of the Ninth Amendment, Texas Law Review 83, 597, 2005, pp. 713-716.

[28] *Farber D.*, Retained by the People: The 'Silent' Ninth Amendment and the Constitutional Rights Americans Don't Know They Have, 2007, pp. 9-10.

[29] *Farber D.*, Retained by the People: The 'Silent' Ninth Amendment and the Constitutional Rights Americans Don't Know They Have, 2007, pp. 103, 184-185; *Lash K.*, Three Myths of the Ninth Amendment, Drake Law Review 56, 101, 2008, p. 876.

He believes, that the Ninth Amendment required a narrow construction of the power delegated to the federal government. To substantiate this, he brings the example of the first constitutional treatise, where *George Tucker* explicitly read the Ninth and Tenth Amendments in the light of the rule of *Vattel's Ius Gentium (Law of Nations)*, which calls for a strict construction of the delegated power. Thus, in the opinion of *Kurt Lash*, the International Law of that time offered the Founders such an interpretation of the Ninth Amendment, according to which the federal government would be restrained from interfering in the issues falling under the sovereign control of the people of the States.[30]

2.4. The Modern Mission of the Ninth Amendment

Finally, a part of the scholars assert based on the interpretive theory, that the Ninth Amendment protects the right unenumerated in the Constitution, but still retained by individuals, i.e. the right to carry out certain activities or practices, which do not lead to any actual physical or economic harm for themselves or other individuals. The moral harm, induced by the discontent or outrage of the public does not suffice for the justification of an interference in the right protected under the Ninth Amendment. The modern mission of the Ninth Amendment is to protect harmless individual freedoms from the interference of the state. The Ninth Amendment is that very ground, where, as *James Madison* wrote, 'State should not act'.[31]

3. THE NINTH AMENDMENT CASE LAW

The Ninth Amendment authorizes the Supreme Court of the United States to recognize other fundamental and protected rights, which, although not enumerated explicitly in the Constitution, are still 'retained by the People'.[32] The U.S. Supreme Court had rarely mentioned the Ninth Amendment in its judgments, until several judges interpreted it in the case of *Griswold v. Connecticut*.[33]

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[30] *Lash K.*, Originalism as Jujitsu, Book Review - *Farber D.*, Retained by the People: The 'Silent' Ninth Amendment and the Constitutional Rights Americans Don't Know They Have, 2007, Constitutional Commentary 25, Issue 3, 2009, p. 525.

[31] *Sanders C. J.*, Ninth Life: An Interpretive Theory of the Ninth Amendment, Indiana Law Review 69, 1994, p. 817.

[32] *Kruschke A. N.*, Finding A New Home for the Abortion Right Under the Ninth Amendment, ConLawNOW 12, 128, 2020, p. 154, available at: <https://ideaexchange.uakron.edu/conlawnow/vol12/iss1/8/> (accessed 14.3.2021).

[33] *Griswold v. Connecticut*, 381 U.S. 479, 1965, available at: <https://supreme.justia.com/cases/federal/us/381/479/> (accessed 1.5.2021). For earlier jurisprudence see the U.S. Supreme Court judgments: *United Public Workers v. Mitchell*, 330 U.S. pp. 75, 94–95, 1947, available at: <https://supreme.justia.com/cases/

3.1 The Pre-Griswold Case Law

The first important legal dispute involving the Ninth Amendment was the case of *Ashwander v. Tennessee Valley Authority*. The petitioners argued that by engaging in power business, the government violated their individual rights to enjoy their private property and to generate the income, which violated the Ninth Amendment. The Court did not find a violation of the Ninth Amendment, stating that the Ninth Amendment does not withdraw the rights which are expressly granted to the Federal Government under the Constitution. The power of the Congress to govern the territory belonging to the United States was one of such rights of the Federal Government.[34]

The second landmark case is *United Public Workers v. Mitchell*, where the petitioner argued, that the citizens have the fundamental right to get involved in political activities and campaigns free from interference of the government. The Court recognized the political rights and declared that unless there were powers delegated by the Congress to the executive power, this specific disputable right would be protected under the Ninth Amendment.[35] Such a differentiation between the constitutional human rights and the power of the Congress in favor of the latter was subjected to the harsh criticism of the society and was evaluated as the unlawful neglect of the Ninth Amendment.[36]

3.2. Griswold v. Connecticut

The Court passed the *Griswold v. Connecticut* judgment in 1965, 174 years after the adoption of the Ninth Amendment. The case involved the constitutionality of the Connecticut statute, which prohibited the use of contraception by married couples. The Court found the law to be unconstitutional with regards to the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments of the Constitution.[37] In this case, Justice *Arthur Goldberg* made a revolutionary interpretation in the jurisprudence of the U.S. Supreme Court, according to which, 'the right of marital privacy, though that right is not mentioned explicitly in the Constitution, is supported both by numerous decisions

federal/us/330/75/> (accessed 1.5.2021); *Ashwander v. Tennessee Valley Authority*, 297 U.S. pp. 288, 300–311, 1936, available at: <https://supreme.justia.com/cases/federal/us/297/288/> (accessed 1.5.2021); *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. pp. 118, 143–44, 1939, available at: <https://supreme.justia.com/cases/federal/us/306/118/> (accessed 1.5.2021). See also the Opinion of *Justice Samuel Chase* in the Case of *Calder v. Bull*, 3 U.S. (3 Dall.) pp. 386, 388, 1798, available at: <https://supreme.justia.com/cases/federal/us/3/386/> (accessed 1.5.2021).

[34] *Ashwander v. Tennessee Valley Authority*, 297 U.S. pp. 288, 300-311, 1936, available at: <https://supreme.justia.com/cases/federal/us/297/288/> (accessed 1.5.2021).

[35] *United Public Workers v. Mitchell*, 330 U.S. p. 75, 1947, available at: <https://supreme.justia.com/cases/federal/us/330/75/> (accessed 1.5.2021).

[36] *Ringold A.F.*, The History of the Enactment of the Ninth Amendment and Its Recent Development, Tulsa Law Review 8, 2013, pp. 12-13.

[37] *Griswold v. Connecticut*, 381 U.S. p. 479, 1965, available at: <https://supreme.justia.com/cases/federal/us/381/479/> (accessed 1.5.2021).

of this Court and by the language of the Ninth Amendment, which reveal that the Framers of the Constitution [...] believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.'[38]

Alongside this interpretation, it is noteworthy that *Arthur Goldberg* did not construct the Ninth Amendment as an independent source of any right.[39] Under his construction, the Ninth Amendment is the solid ground to believe, that 'liberty' mentioned in the Fifth[40] and Fourteenth[41] Amendments is not restricted to the rights explicitly mentioned in the first eight Amendments. The judgment also underscores, that the judges should look to the traditions and (collective) conscience of the people to determine which principles are fundamental and which are not.[42]

3.3. The Post – Griswold v. Connecticut Case

After the *Griswold v. Connecticut* Case, the Ninth Amendment served as a ground of many court petitions. Everyone from pupils to policemen referred to the Ninth Amendment to argue about the unconstitutionality of rules, which for example, regulated the length of hair; On the basis of the Ninth Amendment, petitioners asked for clean water and air and the right to same-sex marriage.[43]

The most important continuations of the *Griswold v. Connecticut* case are the judgments related to the criminalization of abortion by the States. In the landmark case of *Roe v. Wade*, the Court ruled, that the prohibition of abortion violated the Ninth Amendment right of women, to make a decision on an issue, which by their nature belonged to the sphere of the fundamental right to privacy.[44] The constitutional protection of sexual

[38] See the Concurring Opinion of Justice *Arthur Goldberg*, *Griswold v. Connecticut*, 381 U.S. p. 479, 1965, available at: <https://supreme.justia.com/cases/federal/us/381/479/> (accessed 1.5.2021).

[39] *Kutner L.*, The Neglected Ninth Amendment: the 'Other Rights' Retained by the People, Marquette Law Review 51, 1967, p. 129.

[40] The Fifth Amendment involves a cluster of rights, which are related to the civil and criminal proceedings. For additional explanations, see Cornell Law School, Legal Information Institute, Unenumerated Rights, Ninth Amendment, Rights Retained by People, available at: <https://www.law.cornell.edu/constitution/fifth_amendment> (accessed 21.3.2021).

[41] The Fourteenth Amendment involves a whole range of aspects of citizenship and civil rights. It is applied most often in the proceedings as the basis for the right of equality. For additional explanation, see Cornell Law School, Legal Information Institute, Unenumerated Rights, Ninth Amendment, Rights Retained by People, available at: <https://www.law.cornell.edu/constitution/amendmentxiv> (accessed 21.3.2021).

[42] *Griswold v. Connecticut*, 381 U.S. pp. 479, 487-493, 1965, available at: <https://supreme.justia.com/cases/federal/us/381/479/> (accessed 1.5.2021).

[43] New Jersey State Bar Foundation, Invoking the Ninth Amendment, available at: <https://njsbf.org/2020/11/06/invoking-the-ninth-amendment/> (accessed 1.5.2021).

[44] *Roe v. Wade*, 410 U.S. p. 113, 1973, available at: <https://supreme.justia.com/cases/federal/us/410/113/> (accessed 1.5.2021).

and reproductive privacy rights also stem from the *Griswold v. Connecticut* case, which should be considered as an 'embryonic' case in this regard.[45]

In view of the modern case law of the U.S. Supreme Court, it can be stated, that the Court mostly tries to find the specific unenumerated rights behind various amendments, but not under the Ninth Amendment.[46] It may be assumed, that the Court follows the construction of Justice *Arthur Goldberg* in this manner, who declared that the Ninth Amendment does not set forth any independent right and on the other hand, it avoids providing a refuge for unenumerated rights in the Constitution under the Ninth Amendment.

4. OUTLINE

According to the famous dictum of *John Marshal*, 'It cannot be presumed that any clause in the Constitution is intended to be without effect, and therefore such construction is inadmissible unless the words [of the Constitution] require it'.[47] It falls to the future case law of the Court to answer the question, how the court can ascertain that the right is fundamental on the one hand, and that it is protected from interference on the other, when there is a dispute about a fundamental right, which cannot reasonably stem from any amendment of the Bill of rights, including the Ninth Amendment.[48] One group of scholars of the Ninth Amendment asserts that despite the fact that the Ninth Amendment can genuinely be considered as 'the long lost arc' of the judicial lawmaking, there is no reason to perpetuate this situation any longer and the future will show how it will play out in the case law.[49]

IV. ARTICLE 39 OF THE CONSTITUTION OF GEORGIA (THE VERSION PRIOR TO 16 DECEMBER 2018)

Article 45 of the 1921 Constitution served as a basis for the text of the 1995 Constitution of Georgia and until 16 December 2018 it was in effect in the human rights chapter (Second Chapter of the Constitution) as Article 39 (hereinafter 'Article 39'). According to this Article, 'The Constitution of Georgia shall not deny other universally recognized

[45] *Slaughter G. G.*, The Ninth Amendment's Role in the Evolution of Fundamental Rights Jurisprudence, Indiana Law Journal 64, 1988, p. 100.
[46] *Lash K.*, The Lost History of the Ninth Amendment, 2009, pp. 3-11.
[47] *Marbury v. Madison*, 5 U.S. pp. 137, 174, 1803, available at: <https://supreme.justia.com/cases/federal/us/5/137/> (accessed 21.3.2021).
[48] Cornell Law School, Legal Information Institute, Unenumerated Rights, Ninth Amendment, Rights Retained by People, available at: <https://www.law.cornell.edu/constitution-conan/amendment-9> (accessed 21.3.2021).
[49] *Jackson J. D.*, The Modalities of the Ninth Amendment: Ways of Thinking about Unenumerated Rights Inspired by Philip Bobbitt's Constitutional Fate, Mississippi Law Journal 75, 2006, p. 544.

rights, freedoms, and guarantees of an individual and a citizen that are not expressly referred to herein, but stem inherently from the principles of the Constitution'. Namely, Article 39, contentweise similar to Article 45 of the 1921 Constitution, functioned like 'a window' to certain extent for those universally recognized human and citizen rights, freedoms and safeguards, which were not explicitly mentioned in the Constitution, but were inherently derived from the constitutional principles.[50] Along with the constitutional principles, Article 39 introduced international law in the constitutional order and exactly on the basis of the international legal acts, it created the legal basis for the constitutional protection of such rights, like the right to social security and social assistance, for example.[51]

As a result of the Constitutional Amendments of 2018, Article 39 was moved from the Second Chapter to the First Chapter (Article 4, Paragraph 2 of the Constitution of Georgia), which means that an individual is no more entitled to challenge the constitutionality of any legal rule with regard to Article 39 pursuant to the Constitution of Georgia[52] and the Organic Law of Georgia on the Constitutional Court of Georgia.[53] To respond to the question, whether the abovementioned change reduced the procedural and substantive guarantees provided by Article 39, the present part of the article reviews the essence of Article 39 as a tool of a 'living constitution' and analyzes the related case law of the Constitutional Court.

1. ARTICLE 39 – A TOOL OF A 'LIVING CONSTITUTION'?

The Constitution is a living organism, which grows and develops over time in view of its logical framework and interaction with the environment, under the influence of historical, social and political factors.[54] It is more than impossible to explicitly entrench every fundamental right in the Constitution. It is even more impossible for the legislator to be able to foresee the circumstances in advance, so that in the future no case will arise,

[50] *Gegenava D.*, *Javakhishvili P.*, Article 39 of the Constitution: The IDP Norm Waiting for Asylum and Phenomenon of Fear of Unknown in Georgian Constitutionalism, Academic Herald, Special Issue, Legal, Political and Economic Aspects of Revision of the Georgian Constitution, 2017, p. 145 (in Georgian).

[51] *Eremadze K.*, Defenders of Freedom in the Pursuit of Freedom, 2018, p. 369 (in Georgian).

[52] Constitution of Georgia, Article 60, Paragraph 4, Subparagraph 'a': 'The Constitutional Court reviews the constitutionality of a normative act with respect to the fundamental human rights enshrined in the Second Chapter of the Constitution on the basis of a claim submitted by a natural person, a legal person or the Public Defender.' available at: <https://matsne.gov.ge/ka/document/view/30346?publication=36 > (accessed 1.7.2021).

[53] The Organic Law of Georgia on Constitutional Court of Georgia, Article 39, Paragraph 1, Subparagraph 'a': '1. The right to lodge a constitutional claim with the Constitutional Court on the constitutionality of a normative act or its individual provisions shall rest with citizens of Georgia, other natural persons residing in Georgia and legal persons of Georgia, if they believe that their rights and freedoms recognized under the Second Chapter of the Constitution of Georgia have been violated or may be directly violated.' available at: <https://matsne.gov.ge/ka/document/view/32944?publication=29> (accessed 1.7.2021).

[54] *Coan A.*, Living Constitution Theory, Duke Law Journal 66, 2017, p. 100.

which will entail the need of the constitutional protection of a new fundamental right. In order to protect against such situations, the universally recognized legal principles are applied as assisting mechanisms. This mechanism is entrenched in those rules of the Constitution, which convey the respect for universally recognized rights.[55]

In the academic-analytical work related to the adoption of 1921 Constitution, *Giorgi Gvazava* stated that 'the State is a living organism, [...] The aim of the Constitution is not to regulate and arrange everyday needs and rights development, but to create more permanent rights principles, within the scope of which and according to which these regulations and arrangements will take place'.[56] In this regard, *John Marshall's* famous dictum is noteworthy, according to which, the unconditional and ultimate source of authority are the people, which is evidenced by the power of the adoption and the amendment of the Constitution.[57] However, under the power delegated by the people, 'Constitution is what the judges say it is'.[58] Thus, in order for the general constitutional provisions to transform into living and effective rules and address the challenges present in the modern society, it is unconditionally important, that the judges demonstrate competence and courage.[59]

Therefore, it is important for the constant viability of the order of constitutional rights, to have the judiciary acting in the interests of human rights on one hand, and to have a constitutional blueprint on the other hand, which allows for the human rights protection, that is not strictly limited to the rights explicitly enlisted in the Constitution. The so-called enigmatic Article 39 was that the last means, which ensured the non-exhaustiveness of basic rights within the idea of a 'living constitution', and which provided, when needed, the opportunity to breathe life into the basic rights not enumerated in the Constitution.[60] For example, part of the scholars consider, that Article 39 had a clear prospect for the

[55] *Zoidze B.*, Constitutional Review and Order of Values in Georgia, 2007, p. 155 (in Georgian).

[56] *Gvazava G.*, The Main Principles of Constitutional Right, in: *Kordzaze Z.*, *Nemsitsveridze T.* (eds.), Chronicles of Georgian Constitutionalism, 2016, p. 189 (in Georgian).

[57] *Rehnquist W. H.*, The Notion of a Living Constitution, Harvard Journal of Law & Public Policy 29, 1976, p. 404, available at: <https://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Human%20Rights%20BCN%2028-29%20April%202014/Rehnquist_Living_Constitution_HJLPP_2006.pdf> (accessed 29.3.2021).

[58] *Rehnquist W. H.*, The Notion of a Living Constitution, Harvard Journal of Law & Public Policy 29, 1976, p. 407, available at: <https://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Human%20Rights%20BCN%2028-29%20April%202014/Rehnquist_Living_Constitution_HJLPP_2006.pdf> (accessed 29.3.2021).

[59] *Rehnquist W. H.*, The Notion of a Living Constitution, Harvard Journal of Law & Public Policy 29, 1976, p. 407, available at: <https://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Human%20Rights%20BCN%2028-29%20April%202014/Rehnquist_Living_Constitution_HJLPP_2006.pdf> (accessed 29.3.2021).

[60] *Gegenava D.*, *Javakhishvili P.*, Article 39 of the Constitution: The IDP Norm Waiting for Asylum and Phenomenon of Fear of Unknown in Georgian Constitutionalism, Academic Herald, Special Issue, Legal, Political and Economic Aspects of Revision of the Georgian Constitution, 2017, p. 144 (in Georgian).

creative development of the basic rights in view of the constitutional principles and *inter alia*, for the establishment of legal guarantees for the rights of disabled persons, the right of cultural identity and other unenumerated, so-called implied rights of the Constitution.[61]

2. THE CASE LAW OF THE CONSTITUTIONAL COURT OF GEORGIA ON ARTICLE 39

Georgia has established the European model of constitutional review, according to which the Constitutional Court is the specialized body carrying out the constitutional review.[62] By declaring a law or part of it unconstitutional, the Constitutional Court of Georgia functions as a 'negative legislator'.[63] As a result of invalidating the unconstitutional laws, it provides significant assistance to the legislator in structuring its legislative will correctly.[64] While carrying out the legal review, the only legal criterion for the Constitutional Court of Georgia is the Constitution of Georgia. Thus, the human rights referred to in Article 39 were the rights emanated from the Constitution of Georgia and they had been the object of protection for the Constitutional Court of Georgia.[65]

There were a number of cases, where the Constitutional Court of Georgia granted the constitutional protection to rights under Article 39.[66] The Court declared that only those rights may fall within the scope of Article 39 of the Constitution, which are not part of the scope of other constitutional provisions.[67] As a result, Article 39 worked for the protection of those rights, which were not entrenched in the Constitution, but were derived from the constitutional principles.[68] Thus, this norm demonstrated once again,

[61] *Burduli I.*, *Gotsiridze E.*, *Erkvania T.*, *Zoidze B.*, *Izoria L.*, *Kobakhidze I.*, *Loria A.*, *Macharadze Z.*, *Turava M.*, *Pirtskhalaishvili A.*, *Putkaradze I.*, *Kantaria B.*, *Tsereteli D.*, *Jorbenadze S.*, Commentary to the Constitution of Georgia, Chapter II, Citizenship of Georgia, Basic Human Rigts and Freedoms, 2013, p. 483 (in Georgian).

[62] *Gonashvili V.*, *Eremadze K.*, *Tevdorashvili G.*, *Kakhiani G.*, *Kverenchkhiladze G.*, *Chigladze N.*, Introduction to the Constitutional Law, 2016, p. 447, cited in: *Gonashvili V.*, *Eremadze K.*, *Tevdorashvili G.*, *Kakhiani G.*, *Kverenchkhiladze G.*, *Chigladze N.*, Introduction to the Constitutional Law, 2017, p. 443 (in Georgian).

[63] *Faber R.*, The Austrian Constitutional Court – An Overview, Vienna Journal on International Constitutional Law 1, 2008, p. 51 cited in *Gegenava D.*, Constitutional Law of Georgia, 2007, p. 295 (in Georgian).

[64] *Zoidze B.*, Constitutional Review and Order of Values in Georgia, 2007, p. 155 (in Georgian).

[65] *Burduli I.*, *Gotsiridze E.*, *Erkvania T.*, *Zoidze B.*, *Izoria L.*, *Kobakhidze I.*, *Loria A.*, *Macharadze Z.*, *Turava M.*, *Pirtskhalaishvili A.*, *Putkaradze I.*, *Kantaria B.*, *Tsereteli D.*, *Jorbenadze S.*, Commentary to the Constitution of Georgia, Chapter II, Citizenship of Georgia, Basic Human Rights and Freedoms, 2013, p. 483 (in Georgian).

[66] *Eremadze K.*, Defenders of Freedom in the Pursuit of Freedom, 2018, p. 369 (in Georgian).

[67] Ruling of the Constitutional Court of Georgia of 8 September 2017 – *Citizen of Georgia Paata Kobuladze v. The Government of Georgia* (N 1/17/738), II para. 3, available at: <https://constcourt.ge/ka/judicial-acts?legal=1276> (accessed 1.7.2021).

[68] Recording Notice of the Constitutional Court of Georgia of 29 May 2007 – *The Public Defender of*

that the required precondition for the recognition of a right is not its entrenchment in any constitutional article; instead, the main legal precondition is that the right is derived from the constitutional principles.[69] According to the explanation of the Constitutional Court, Article 39 'does not provide for rights and freedoms'.[70] Nevertheless, the constitutional provision of Article 39 covers those rights, which although indirectly, but still derive from the constitutional principles and this latter approach constitutes a constitutional solution, a regulation of a sort.[71] These constitutional legal principles are the following: democratic form of government; economic freedom; social state; state of law; protection of universally recognized human rights and freedoms.[72] To answer the question of when the dispute based on Article 39 would be successful in the Constitutional Court, the case law of the Constitutional Court states the following: 'Article 39 can be referred to, when the right is not entrenched in the Constitution of Georgia, or the scope of the constitutional right is more narrow, than what is emanated from the international obligation.'[73] More precisely, under the case law of the Constitutional Court of Georgia, this Article was applied, when even after interpreting the explicitly enumerated norms of the Constitution, no adequate counterpart was found for the standards provided in the international legal document.[74]

The Constitutional Court of Georgia has evaluated the specific legal cases against the obligations stemming from the international acts based on Article 39 on multiple occasions. For example, in the 2002 judgment in the case of *Bachua Gachechiladze et al. v. The Parliament of Georgia*, while discussing the International Law and general importance of the complainants' rights, the Constitutional Court focused on the

Georgia v. The Parliament of Georgia (N2/2/416), II para. 1, available at: <https://constcourt.ge/ka/judicial-acts?legal=429> (accessed 1.7.2021).

[69] *Zoidze B.*, Constitutional Review and Order of Values in Georgia, 2007, p. 155 (in Georgian).

[70] Judgment of the Constitutional Court of Georgia – *1. Citizen Avtandil Rijamadze v. The Parliament of Georgia; 2. Citizen Neli Mumladze v. The Parliament of Georgia* (N2/6/205,232), II para. 1, available at: <https://www.constcourt.ge/ka/judicial-acts?legal=176> (accessed 1.7.2021).

[71] Recording Notice of the Constitutional Court of Georgia of 29 May 2007 – *The Public Defender of Georgia v. The Parliament of Georgia* (N 2/2/416), II para. 1, available at: <https://constcourt.ge/ka/judicial-acts?legal=429> (accessed 1.7.2021).

[72] *Tugushi T.*, *Burjanadze G.*, *Mshvenieradze G.*, *Gotsiridze G.*, *Menabde V.*, Human Rights and the Case Law of the Constitutional Court of Georgia, 2013, p. 537 (in Georgian).

[73] Judgment of the Plenum of the Constitutional Court of Georgia of 11 July 2011 - *The Public Defender of Georgia v. The Parliament of Georgia* (N3/2/416), II para. 66, available at: <https://www.matsne.gov.ge/ka/document/view/1404703?publication=0> (accessed 1.7.2021); Ruling of the Constitutional Court of Georgia of 10 June 2009 - *Citizens of Georgia – Davit Sartania and Aleksandre Macharashvili v. The Parliament of Georgia and The Minister of Justice of Georgia* (N1/2/458), II paras. 22-23, available at: <https://constcourt.ge/ka/judicial-acts?legal=404> (accessed 1.7.2021); Ruling of the Constitutional Court of Georgia of 30 July 2010 - *Citizens of Georgia – Otar Kvenetadze and Izolda Rcheulishvili v. The Parliament of Georgia* (N 1/5/489-498), II para. 3, available at: <https://www.constcourt.ge/ka/judicial-acts?legal=488> (accessed 1.7.2021).

[74] *Tugushi T.*, *Burjanadze G.*, *Mshvenieradze G.*, *Gotsiridze G.*, *Menabde V.*, Human Rights and the Case Law of the Constitutional Court of Georgia, 2013, p. 537 (in Georgian).

obligations established under the international treaties, namely, Article 22[75] and Article 25[76] of the Universal Declaration of Human Rights. The Court pointed out, that as clearly indicated from the text of the Declaration, the States should aspire to fulfill their international legal obligations through the national and international measures.[77] In the same case, the Constitutional Court provided a crucial interpretation of the scope of Article 39 in the light the obligations settled under the international treaties of Georgia. Namely, with regards to the social rights it decided that for their protection, the State should at least ensure the minimum core level of these rights. 'Otherwise, international-legal obligations of the states are meaningless.'[78] Therefore, the Court interpreted on the issue of the recognition of social rights in Georgia based on Article 39, that the social and economic rights are constitutionally recognized rights, according to the established case law.[79] The Court provided a broader interpretation of Article 39, when it expanded the scope of Article 39 not on the basis of a binding international instrument for Georgia, but on the basis of the recommendatory international document. In this case, the Constitutional Court used the Recommendation of the Council of the European Union of 27 October 1981 on electricity tariff structures (81/924).[80]

[75] The Universal Declaration of Human Rights, Article 22: 'Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.' available at: <http://www.supremecourt.ge/files/upload-file/pdf/aqtebi3.pdf> (accessed 1.7.2021).

[76] The Universal Declaration of Human Rights, Article 25, Paragraph 1: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.' available at: <http://www.supremecourt.ge/files/upload-file/pdf/aqtebi3.pdf> (accessed 1.7.2021).

[77] Judgment of the Constitutional Court of Georgia of 18 April 2002 – *1. Bachua Gachechiladze, Simon Turvandishvili, Shota Buadze, Solomon Sanadiradze and Levan Kvatsbaia, 2. Vladimer Doborjginidze, Nineli Andriadze, Guram Demetrashvili and Shota Papiashvili, 3. Givi Donadze v. The Parliament of Georgia* (N1/1/126,129,158), II para. 3, available at: <https://constcourt.ge/uploads/documents/5e5fabc956497.docx> (accessed 1.7.2021).

[78] Judgment of the Constitutional Court of Georgia of 18 April 2002 – *1. Bachua Gachechiladze, Simon Turvandishvili, Shota Buadze, Solomon Sanadiradze and Levan Kvatsbaia, 2. Vladimer Doborjginidze, Nineli Andriadze, Guram Demetrashvili and Shota Papiashvili, 3. Givi Donadze v. The Parliament of Georgia* (N1/1/126,129,158), II para. 4, available at: <https://constcourt.ge/uploads/documents/5e5fabc956497.docx> (accessed 1.7.2021).

[79] Judgment of the Constitutional Court of Georgia of 18 April 2002 – *1. Bachua Gachechiladze, Simon Turvandishvili, Shota Buadze, Solomon Sanadiradze and Levan Kvatsbaia, 2. Vladimer Doborjginidze, Nineli Andriadze, Guram Demetrashvili and Shota Papiashvili, 3. Givi Donadze v. The Parliament of Georgia* (N1/1/126,129,158), II para. 3, available at: <https://constcourt.ge/uploads/documents/5e5fabc956497.docx> (accessed 1.7.2021), as cited in *Dzamashvili B.*, Social and Economic Rights: Basic Rights or State Policy Directives?, Law Review 1, 2015, p. 401.

[80] The Judgment of the Constitutional Court of Georgia of 30 December 2002 – *Citizen of Georgia, Shalva Natelashvili v. The Parliament of Georgia, the President of Georgia and the Georgian National Energy Regulation Commission (GNERC)* (N1/3/136), I para. 8, available at: <https://constcourt.ge/ka/judicial-acts?legal=116> (accessed 5.7.2021).

As a conclusion, it can be stated, that in view of the case law of the Constitutional Court of Georgia, the goal of Article 39 is to ensure the protection of rights and freedoms in the case, when the rights derived from the constitutional principle or from the obligations imposed on Georgia at the international level is not explicitly set in the constitutional norms, or does not fall within the scope of the enumerated constitutional rights.

V. DID THE TRANSFER OF ARTICLE 39 FROM THE SECOND CHAPTER TO THE FIRST CHAPTER OF THE CONSTITUTION REDUCE THE SUBSTANTIVE AND PROCEDURAL SAFEGUARDS OF RIGHTS PROTECTION?

As reviewed in the fourth part of this article, the Constitutional Court of Georgia applied the mechanism provided in Article 39 and transformed it into an effective room of broad manoeuvre. Therefore, since a 'norm is the only form of existence of basic rights'[81], Article 39 was transformed into a rule, which granted the viability to the rights unenumerated in the Constitution. In view of the undertaken amendments, namely, the transfer of Article 39 from the Second Chapter to the First Chapter, it is interesting from the human rights perspective, what solution will follow from the transformation of this norm from a means of protection of rights to a principle.

The explanatory note to the Draft Constitutional Law of Georgia on the Amendment of the Constitution of Georgia states the following: 'For legal certainty, it is appropriate, that the constitutional complaints brought before the Court are based on specific basic rights entrenched in the Second Chapter of the Constitution, which ensures the application of those clear criteria by the Constitutional Court in its decision-making, that are established in the doctrine of these rights. It should also be noted, that the Second Chapter of the Constitution provides for a comprehensive protection of basic human rights, even in case, when any given aspect of individual's freedom is not protected under the specific provision of the Constitution. The Constitution enshrines the right of dignity of a human being, the right to free personal development and other basic rights, based on which individuals can fully protect any aspect of individual freedom and activities.'[82]

From the very first reading it becomes clear, that the Constitution of Georgia does not allow the opportunity anymore that was available until now to introduce a legal dispute on the basis of Article 39 and find a law unconstitutional with regard to it, after Article

[81] *Izoria L.*, *Korkelia K.*, *Kublashvili K.*, *Khubua G.*, Commentary to the Constitution of Georgia, Fundamental Human Rights and Freedoms, 2005, p. 334 (in Georgian).

[82] The Explanatory Note on the Draft Constitutional Law of Georgia, Article 4, available at: <https://info.parliament.ge/file/1/BillReviewContent/149115?fbclid=IwAR09W5ujU45YLZIeJ3UV5jddzXPhSDTjVuzMa_7M_akbPAU_XIMvajRDZxc> (accessed 25.3.2021).

39 was transferred to the First Chapter of the Constitution. However, the explanatory note argues instead, that it is fully possible to find the legal goods protected under Article 39 in other articles of the Constitution. The following text of the explanatory note is also noteworthy, according to which '[it is appropriate] to base a complaint on the specific basic rights enshrined in the Second Chapter of the Constitution'.[83] It can be inferred from this statement, that the legislator's decision to move Article 39 to the First Chapter was also determined by the approach taken by the legislator, that Article 39 was not a norm establishing a specific right; it was seen as an abstract and enigmatic rule instead.

The proposed route may not appear painless in the process of systemic development and refinement of the human rights protection, since the mentioned rights, including the right to dignity and freedom of personal development cannot substitute the established window function of Article 39 in regard to the constitutional principles or international obligations with mathematical accuracy. However, it should be noted for fairness, that it is fully possible for the Constitutional Court of Georgia to read out the constitutional safeguards provided by the pre-amendment text of the Constitution in the articles mentioned in the explanatory note to the constitutional amendment in case of necessity. Apart from this, we consider, that the solution chosen by the legislator significantly worsened the position of the prospective complainants to the Constitutional Court. This argument is based on the fact, that the actual and direct legal force of Article 39 have been manifested on multiple occasions in the judgments of the Constitutional Court of Georgia and this Article was not an ambiguous legal norm (as the explanatory note suggests); it used to be a door for the specific rights instead, that are left unenumerated in the text of the Constitution.

The case of *Citizen of Georgia Shalva Natelashvili v. The Parliament of Georgia*, the President of Georgia and The Georgian National Energy Regulation Commission substantiates this assertion. The Constitutional Court found a violation with regards to Article 39 in this case, and it was exactly this judgment, where the Court expanded the scope of Article 39, *inter alia*, based on recommendatory international documents.[84] The judgment of the Constitutional Court in the case of No. 174 Constitutional Complaint of the Citizens of Georgia – 1. *Tristan Khanishvili, Tedore Ninidze, Nodar Chitanava, Levan Aleksidze and others (total 11 complainants) v. The Parliament of Georgia* is also noteworthy. Here, the Court decided that the impugned norm had to be declared unconstitutional with regard to Article 39 of the Constitution of Georgia, which *inter*

[83] The Explanatory Note on the Draft Constitutional Law of Georgia, Article 4, available at: <https://info.parliament.ge/file/1/BillReviewContent/149115?fbclid=IwAR09W5ujU45YLZIeJ3UV5jddzXPhSDTjVuzMa_7M_akbPAU_XIMvajRDZxc> (accessed 25.3.2021).

[84] Judgment of the Constitutional Court of Georgia of 30 December 2002 – *Citizen of Georgia, Shalva Natelashvili v. The Parliament of Georgia, the President of Georgia and the Georgian National Energy Regulation Commission (GNERC)* (N1/3/136), I para. 8, available at: <https://constcourt.ge/ka/judicial-acts?legal=116> (accessed 5.7.2021).

alia, protected the right of social security of the complainants. The Court emphasized Article 9 of the International Covenant on Economic, Social and Cultural Rights[85] and declared the norm unconstitutional.[86]

Article 39 of the Constitution was directly applicable even earlier, when the Constitutional Court stated in its 2002 judgement in the case of *Bachua Gachechiladze et al v. The Parliament of Georgia*, that the constitutional basis of the complainants' rights was Article 39 and it found the specific impugned norms unconstitutional with regard to Article 39. The tangible consequences of the application of Article 39 are also elucidated in the judgment of the Constitutional Court of Georgia, where the Court Chamber decided, that the state was obligated to ensure the right of the population to form the local self-government bodies and to elect heads of respective bodies independently, without the interference of state bodies or officials. The legal basis for finding a violation in this case was Article 39. The Court also referred to the international act here, namely, the International Covenant on Civil and Political Rights of 1966 and the international obligations established under this Covenant.[87]

Thus, in addition to the broad prospects of lawmaking and development of the scopes of rights, Article 39 of the Constitution of Georgia played a practical role and provided an effective and real mechanism of the protection of human rights. In view of this tangible role, we can consider, that Article 39, as a legal successor of Article 45 of the 1921 Constitution of the Democratic Republic of Georgia, was not only an emanation of a symbolic inspiration of the Ninth Amendment of the U.S. Constitution, but it also served that very goal, that the founders of the 1921 Constitution had in mind. Transferring Article 39 to the First Chapter of the Constitution deprived individuals of the possibility to bring the constitutional complaints before the Constitutional Court and challenge the constitutionality of a normative acts or part of it, if they consider that the right that has been violated or may get directly violated, is a right not explicitly stated in the Second Chapter of the Constitution.[88]

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[85] Article 9 of the International Covenant on Economic, Social and Cultural Rights: 'The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.' available at: <https://matsne.gov.ge/ka/document/view/1483577?publication=0> (accessed 5.7.2021).

[86] Judgment of the Constitutional Court of Georgia of 15 October 2002 – *No. 174 Constitutional Complaint of the Citizens of Georgia – 1. Tristan Khanishvili, Tedore Ninidze, Nodar Chitanava, Levan Aleksidze, et al. (Total 11 Complainants) v. The Parliament of Georgia* (N1/2/174,199), II para. 2, available at: <https://constcourt.ge/ka/judicial-acts?legal=230> (accessed 1.7.2021).

[87] Judgment of the Constitutional Court of Georgia of 16 February 2016 – *Citizens of Georgia – Uta Lipartia, Giorgi Khmelidze v. The Parliament of Georgia* (N1/2/213,243), available at: <https://constcourt.ge/ka/judicial-acts?legal=211> (accessed 1.7.2021).

[88] Constitution of Georgia, Article 60, Paragraph 4, Subparagraph 'a', available at: <https://matsne.gov.ge/ka/document/view/30346?publication=36> (accessed 1.7.2021); The Organic Law of Georgia On Constitutional Court of Georgia, Article 39, Paragraph 1, Subparagraph 'a', available at: <https://matsne.gov.ge/ka/document/view/32944?publication=29> (accessed 1.7.2021).

It is also noteworthy that in the aforementioned cases the Constitutional Court not only found violations with regard to Article 39 of the Constitution, but it also paid particular attention to the fulfillment of international legal obligations taken upon by Georgia. As a result, it can be considered, that for the purposes of the progressive interpretation of rights, the Constitutional Court directly involved the need of the consideration of the obligations imposed by the international law in its reasoning. This approach is nothing short of a step taken in favor of human rights. Article 26 of the 1969 Vienna Convention on the Law of Treaties establishes the principle of *'Pacta Sunt Servanda'*, according to which, 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'. According to Article 4, Paragraph 5 of the Constitution of Georgia, 'The legislation of Georgia shall comply with the universally recognized principles and norms of international law. An international treaty of Georgia shall take precedence over domestic normative acts, unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia'. As a result, the presence of Article 39 in the Second Chapter provided the complainants with the prospect to apply to the Constitutional Court on one hand, and one the other hand, it provided them with the opportunity to argue the existence of a specific right, which was not explicitly enumerated in the Constitution in the light of international law under Article 39 for the strategic litigation purposes. Thus, Article 39 was an umbrella-right to certain extent for those claimants, who theoretically could not find the counterpart of their violated right in other articles. Naturally, the disappearance of Article 39 from the Second Chapter does not *inter alia* rule out the expansion of the scopes of other constitutional rights in the light of international law. However, it is noteworthy, that as the explanatory note suggests, every complainant, who decides to bring a claim with regards to what has been the scope of Article 39 until recently, will have to find the specific constitutional safeguard, which does not fit the scope of other constitutional Articles under the right of dignity or the freedom of personal development, which compared to the previous regulation, imposes substantial burden on the complainant.

Thus, the amendment has on one hand reduced the scope of the norm, which introduced the mechanism of the 'living constitution' in the Constitution of Georgia and on the other hand, it limited the standing of prospective complainants to challenge the constitutionality of specific norms with regards to rights protected under Article 39, which is clearly a regulation worsening the systemic protection of rights.

VI. CONCLUSION

The present work gives an affirmative answer to the question of whether the legislator defied the legacy of Article 45 of the 1921 Constitution with the 2018 amendments. This claim is based on the review of Article 45 of the 1921 Constitution of the Democratic

Republic of Georgia and the Ninth Amendment of the U.S. Constitution as an inspiration for the drafting of Article 45, which is followed by the elaboration on the theoretical and procedural role of Article 39 (the version prior to 16 December 2018) in the list of human rights and freedoms protected in the Second Chapter of the Constitution and its link to the effective mechanisms of the 'living constitution'.

This analysis demonstrates, that through the 2018 amendments the legislator defied the procedural role of Article 39, the legal successor of the Article 45 of the 1921 Constitution, in the context, where based on the case law of the Constitutional Court of Georgia, Article 39 ensured the protection of rights and freedoms in the case, when the right was not explicitly stated in the norms of the Constitution of Georgia, but was inherently derived from the constitutional principles and the obligations imposed on the state at the international level. Moreover, it can be stated, that Article 39 played a bigger practical role in case law of the Constitutional Court of Georgia, than the Ninth Amendment of the U.S. Constitution has in this regard. This is due to the fact that, as demonstrated in the third part of this article, in spite of some landmark cases, the general trend of the courts shows that the judges shun referring to the Ninth Amendment as a basis of specific constitutional rights and find the constitutional guarantees among the explicitly enumerated rights in the Constitution. In contrast to this, as it was reviewed in the fourth and fifth parts of this article, the Constitutional Court of Georgia has found a violation with regards to Article 39 of the Constitution on multiple occasions. As a result, it can be stated that prior to the amendments of 2018, individuals with a standing to apply to the Constitutional Court had an important legal tool at their disposal for the protection of their rights, which were not enumerated in the Constitution, but inherently derived from constitutional principles or international legal obligations taken upon by the state.

Moreover, some criticism should be voiced with regards to the following statement of the explanatory note on the Draft Constitutional Law of Georgia on the Amendment of the Constitution of Georgia: 'For legal certainty, it is appropriate, that the constitutional complains brought before the Court are based on specific, basic rights entrenched in the Second Chapter of the Constitution, which ensures the application of those clear criteria by the Constitutional Court in its decision-making, that are established in the doctrine of these rights.'[89] It can be inferred from this claim, that Article 39 did not contain any specific right, whereas the case law of the Constitutional Court of Georgia proves the very opposite; even the rights to social security and social assistance 'found a refuge' under Article 39.

[89] The Explanatory Note on the Draft Constitutional Law of Georgia, Article 4, available at: <https://info.parliament.ge/file/1/BillReviewContent/149115?fbclid=IwAR09W5ujU45YLZIeJ3UV5jddzXPhSDTjVuzMa_7M_akbPAU_XIMvajRDZxc> (accessed 25.3.2021).

In this regard, it is symbolic to remember the words of the invited member of the Constitutional Commission, lawyer *Konstantine Mikeladze*, who stated in the process of the adoption of the 1921 Constitution, that 'Rights are available as long, as there are duties. [...] The Constitution may include such norms, the function of which is to make the basic rights of individuals inviolable for the ordinary legislator and executive authorities, i.e. they should have appropriate safeguards.'[90] Hence, as the Constituent Assembly included Article 45 in the text of the Constitution in 1921 and then Article 39 was drafted as an analog of Article 45 in 1995, this reinforced the will that Article 39 regulated specific right/rights, regarding to which the state had specific obligations. As it was noted repeatedly, this can be seen in the case law of the Constitutional Court, as well.

As a result, the transfer of Article 39 from the Second Chapter to the First Chapter limited the opportunity of individuals to bring claims based on this article to the Constitutional Court. Moreover, this amendment also reduced the scope of the mechanism of the 'living constitution' in the Constitution of Georgia, even though, we can hope that the Constitutional Court will not, in view of the principles recognized in the First Chapter of the Constitution, forget the path of human rights paved up until now. Therefore, in spite of such a reduction of the legacy of Article 45 of the 1921 Constitution, it is important that the Constitutional Court of Georgia continues its progress towards the passing of judgments in favor of human rights and finds some important, valuable pillars, which will allow the citizens to dispute for the protection of those rights again, which are recognized under the constitutional principles and international obligations imposed on the state, but are not explicitly stated in the constitutional text.

[90] *Mikeladze K.*, Constitution of the Democratic State and Parliamentary Republic, Some Considerations on Drafting of the Constitution of Georgia in: *Kordzaze Z.*, *Nemsitsveridze T.* (ed.), Chronicles of Georgian Constitutionalism, 2016, p. 77 (in Georgian).