

**Human Rights and Fundamental Freedoms: the Relationship of International,
Transnational and National Catalogues in the 21st Century**

National Report

XVIIIth Congress of the Conference of European Constitutional Courts

**I. GENERAL PART: CATALOGUES OF HUMAN RIGHTS AND
FUNDAMENTAL FREEDOMS**

I.I International catalogues of human rights (ECHR, UDHR and ICCPR)

Pursuant to article 4.2 of the Constitution of Georgia, “[t]he State acknowledges and protects universally recognised human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the State shall be bound by these rights and freedoms as directly applicable law. The Constitution shall not deny other universally recognised human rights and freedoms that are not explicitly referred to herein, but that inherently derive from the principles of the Constitution.” Article 4.5 of the Constitution specifically determines the status of international treaties in relation to domestic legal acts. It states “[t]he legislation of Georgia shall comply with the universally recognised 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.” It thus follows that the Constitution and the Constitutional Agreement of Georgia take precedence over international treaties, whereas the latter enjoy superior legal force over other domestic legal acts.

According to the Constitution and legislation of Georgia, those international treaties to which Georgia subscribed to and thereby is a contracting State become the part of domestic legislation – a normative legal act, which has the capacity to regulate legal relations. Therefore, international treaties, in principle, do not require additional implementing measures for the common courts to be directly invoked. As for the Constitutional Court, it has an explicit mandate to apply only the Constitution of Georgia, the supreme law of the land, to which other legal acts, including international treaties, shall comply. Pursuant to article 39 of the Constitution of Georgia, effective as of 16 December 2018, “[t]he

Constitution of Georgia shall not deny other universally recognised 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.” This constitutional provision allowed the Constitutional Court to assess the compliance of domestic normative legal act with the right that was recognised by international treaties but was not explicitly referred to the Constitution. However, the Constitution of Georgia no longer contains the foregoing precept and the Constitutional Court does not thereby have an obligation to base its decisions upon international treaties, yet it can (which it has been willing to do) refer to international treaties or jurisprudence of international courts when interpreting constitutional rights and freedoms.

As it was indicated above, international treaties are part of the domestic legal system and the common courts are entitled to ground its decisions on international treaties. It follows that international treaties, as well as international human rights instruments are directly applicable in Georgia. For instance, there are provisions in procedural legislation – in Criminal Procedure Code and Civil Procedure Code – that provide a legal mechanism to revise final judicial decisions (and/or reopen a case) on the basis of a judgment of the European Court of Human Rights, which found a violation of the European Convention on Human Rights (and/or its additional protocols) due to a respective judicial decision. In this context it is fitting to emphasise the jurisprudence of the Supreme Court of Georgia. For example, in an administrative case¹, the subject matter related to the reversal of a final court decision based on evidence of new or newly discovered fact – judgment of the European Court of Human Rights finding a violation. The Administrative Procedure Code specifically set forth that the foregoing ground did not allow for reopening of an administrative case. The Supreme Court of Georgia developed its reasoning on the basis of international treaties, among others, the Association Agreement concluded between Georgia and the European Union, and indicated that despite a clear prohibition in the Administrative Procedure Code, the reopening of the given case to recover moral damages was needed in compliance with international obligations.

As regards the direct effect of international human rights instruments upon the Constitutional Court, pursuant to article 60.4 of the Constitution of Georgia, the Constitutional Court, *inter alia*, reviews the constitutionality of international treaties. It thus follows that the Constitutional Court only relies upon the Constitution of Georgia in the

¹ Judgment of the Supreme Court of Georgia N 3-1504-8(ს-18), 22.02.2019.

course of its decision-making, and international treaties do not have direct effect in this respect.

I.II Supranational catalogues of human rights (the Charter)

Georgia is not a member state of the European Union and domestic courts are not bound to apply European Union law.

I.III National human rights catalogue

The Constitution of Georgia recognises and enshrines fundamental human rights and freedoms. The chapter 2 of the Constitution is dedicated to the human rights and freedoms. It contains 27 articles (articles 9 – 35 of the Constitution) and combines internationally recognised virtually every right and basic freedom. The chapter 2 begins with the right to dignity (article 9) and ends with the rights and competencies granted to the Public Defender of Georgia (article 35).

The first Constitution of Georgia was adopted on 21 February 1921 by the Constituent Assembly. The chapter 3 of the first Constitution was dedicated to basic rights of a citizen. It recognised e.g. the right to equality before law, principles of habeas corpus, the freedom of expression and association, the universal suffrage and other rights that are a cornerstone of a modern democratic state conceived in rule of law. The first Constitution of the Democratic Republic of Georgia took effect only for 4 days before it was suspended on 25 February 1921 by the occupying forces. During the Soviet occupation, 4 different constitutions were adopted in Georgia in 1922, 1927, 1937 and 1978. After regaining independence, Georgia adopted a new Constitution on 24 August 1995. The preamble of the 1995 Constitution refers to “the historical and legal legacy of the Constitution of Georgia of 1921”. The rights and freedoms of the present 1995 Constitution were designed and formulated on the basis of the 1921 Constitution and the principles and standards of international law.

Since 1995 the chapter 2 of the Constitution has undergone some changes, yet the biggest changes were adopted as a result of the 2017 constitutional reform. Under the said reform, several human rights provisions underwent changes, their scope was broadened and the basis for their restriction was modified. In this respect the emphasis should be given to the right to equality before law (article 11). This provision now includes the special clause for the

equality between men and women. Namely, the provision reads as follows: “[t]he State shall provide equal rights and opportunities for men and women. The State shall take special measures to ensure the essential equality of men and women and to eliminate inequality.” In addition, article 11 obliges the State to “create special conditions for persons with disabilities to exercise their rights and interests.” The 2017 changes also introduced the right to access and freely use the internet (article 17.4), the right to fair administrative proceedings (article 18.1), academic freedom and the autonomy of higher educational institutions (article 27.3), and the right of a citizen to affordable and quality health care services. Moreover, with respect to the constitutional amendment procedure (article 77), “[t]he Constitution shall be revised by a constitutional law. More than half of the total number of the Members of Parliament, or no less than 200 000 voters, shall be entitled to submit a draft constitutional law. A draft constitutional law shall be submitted to Parliament, which shall make the draft public for nation-wide public discussions. Parliament shall begin deliberations on the draft law 1 month after its publication.” A constitutional law shall be considered adopted if **(a)** it is supported by at least two thirds of the total number of the Members of Parliament. The constitutional law shall be submitted to the President of Georgia for signature within 10 days following its approval, in one hearing, without amendments by at least two thirds of the total number of the members of the next Parliament; or **(b)** if supported by at least three fourths of the total number of the Members of Parliament, the constitutional law shall be adopted. In case of the declaration of a state of emergency or martial law, deliberations on a draft constitutional law shall be suspended until the state of emergency or martial law has been revoked.

I.IV The mutual relationship between different catalogues of human rights

As it was already indicated, the Constitutional Court of Georgia grounds its decisions solely on the Constitution of Georgia and is not bound to directly apply international treaties or jurisprudence. Nevertheless, the Constitutional Court can and does refer to relevant international treaties and case law to interpret the constitutional rights and freedoms, the scope and/or substance thereof. In this respect, there are instances when the Constitutional Court invokes judgments of the European Court of Human Rights and the Court of Justice of the European Union, or to provisions of other international treaties. For instance, in one case,² which related to retrospective application of a lenient law, the Constitutional Court cited the

² Judgment of the Constitutional Court of Georgia, N1/4/557,571,576, 13.11.2014.

respective article 7 of the European Convention on Human Rights and also, referred to the Case of *Scoppola v. Italy* (decided by the Grand Chamber of the European Court of Human Rights on 17.09.2009). Similarly, the Constitutional Court when deciding on the constitutionality of a rule about the seizure of illegal property,³ referred to standards of the European Court of Human Rights and also, to several international instruments: “The United Nations Convention against Corruption”, “The United Nations Convention against Transnational Organized Crime”, “The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances”, “The International Convention for the Suppression of the Financing of Terrorism”, “The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism”, also, article 5 of the „Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union“. In another case⁴ that related to a blanket restriction on homosexuals of the right to donation of blood and its components, the Constitutional Court cited the judgment of the Court of Justice of the European Union⁵ in the reasoning part of its ruling. The said judgment concerned to standards of the right to blood donation in the European Union. It can be clearly concluded hence that the Constitutional Court of Georgia quite often refers to international instruments and/or jurisprudence in its case law.

The Constitutional Court of Georgia applies international instruments and/or jurisprudence, as a rule, in order to interpret constitutional rights. There has not been any case where the Constitutional Court assessed or elaborated upon the potential relationship, hierarchy or competition of the catalogues of human rights determined by international instruments.

The Constitutional Court has never adjudged and thereby there is no established procedure for choosing a specific catalogue of human rights in cases where the right is protected under more catalogues.

II. SPECIAL PART – SPECIFIC ISSUES RELATED TO SELECTED FUNDAMENTAL RIGHTS

³ Judgment of the Constitutional Court of Georgia, N2/1/631, 18.04.2016.

⁴ Ruling of the Constitutional Court of Georgia, N1/13/878, 13.07.2017.

⁵ Judgment of the Court of Justice of the European Union, C-528/13, 29.04.2015 on the case of “Geoffrey Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes, Établissement français du sang“.

II.I Right to life

The Right to life is protected by the article 10 of the Constitution of Georgia (“Right to life and physical integrity”). The first paragraph of the said constitutional provision reads as follows: “Human life shall be protected. The death penalty shall be prohibited.”

The article 10 of the Constitution of Georgia does not enlist the conditions when the right to life may be restricted. Moreover, the Constitutional Court of Georgia has not yet decided in its jurisprudence upon general standards of the right to life and/or restrictions thereof.

As it was indicated, the Constitutional Court of Georgia did not decide upon the constitutional right to life and thereby, the judicial practice in this regard is lacking. In one case,⁶ the complainant – a legal entity – argued that there was no adequate control on the consumption of tobacco in Georgia that resulted in the increasing smoker fatalities. This, per complainant’s submission, contradicted the right to life. The Constitutional Court in this case focused on the lack of legal standing by the complainant, since it as a legal entity was not allowed to submit such claim, for the constitutional right to life was afforded only to individuals. In another case,⁷ the complainant challenges the constitutionality of regulation in relation to the right to life that strips of the possibility for an individual who does not have a permanent registered address to register as socially vulnerable family and thus receive a state-provided subsistence. The said complaint is still pending before the Constitutional Court. Apart from the above-mentioned cases, there is no further jurisprudence on the constitutional right to life.

Summary:

- Only an individual – a physical person – is entitled to the constitutionally guaranteed right to life and a legal entity has no standing in this regard;
- Registration as a socially venerable family and the right to receive state-provided subsistence is related to the constitutional right to life.

Since the Constitutional Court of Georgia applies, among others, international instruments and jurisprudence when interpreting constitutional provisions, there is no difference between

⁶ Ruling of the Constitutional Court of Georgia, N2/3/441, 18.06.2008.

⁷ Recording Notice of the Constitutional Court of Georgia, N1/6/854, 10.02.2017.

its case law and the case law of international courts with respect to the protection of the right to life.

II.II Freedom of expression

The freedom of expression is guaranteed by article 17 of the Constitution of Georgia (Right to freedom of opinion, information, mass media and the internet). The first paragraph reads as follows: “Freedom of opinion and the expression of opinion shall be protected. No one shall be persecuted because of his/her opinion or for expressing his/her opinion.” The second paragraph determines that “Every person has the right to receive and impart information freely”, whereas the third paragraph provides “Mass media shall be free. Censorship shall be inadmissible. Neither the State nor individuals shall have the right to monopolise mass media or the means of dissemination of information.”

According to the jurisprudence of the Constitutional Court of Georgia, the freedom of expression is not an absolute and may be restricted provided it serves one of the purposes enlisted in this very constitutional provision (paragraph 5). Namely, an exhaustive list of the article 17.5 of the Constitution determines that “The restriction of these rights may be allowed only in accordance with law, insofar as is necessary in a democratic society for ensuring national security, public safety or territorial integrity, for the protection of the rights of others, for the prevention of the disclosure of information recognised as confidential, or for ensuring the independence and impartiality of the judiciary.” According to the established constitutional jurisprudence, provided there is the freedom of expression restricted, the Constitutional Court would check:

- whether the restriction pursues one or many goals enlisted in article 17.5 of the Constitution;
- whether the principle of proportionality is observed between the interests of an individual and the public;
- whether the restrictive regulation provides a proportionate, narrowly-tailored means to the objective pursued;
- whether the protected good outweighs the harm caused by the restriction in question.

According to the case law of the Constitutional Court of Georgia, the freedom of expression is essential for modern society and it is a very quality that determines the level of freedom and democracy in a state. “The right to freedom of expression is one of the preconditions necessary for existence of and complete development of a democratic society. Unimpeded dissemination of thought and information ensures the diversity of opinions, promotes public and informed discussion on the issues important for the society, and enables the engagement of each member of a society in the public life.”⁸ This constitutional right guarantees the possibility of an individual to freely express their opinion or refrain from doing so. In this respect, the Constitution prohibits persecution of an individual on the basis of opinion, also coercion express their opinion. This constitutional right protects the process of expression and dissemination of an opinion and their forms.⁹ It also affords protection to expression and the ability to freely receive and impart information through different sources, including print and broadcasting – radio and television – media.¹⁰ As for the freedom of expression with respect to its content, according to the case law of the Constitutional Court of Georgia, it protects not only information and ideas that are generally accepted by the society or those that are not offensive or there are indifferent feelings about it, but also it extends to information and ideas that that may be offensive, shocking and disturbs the state or certain groups of society.¹¹ “It shall not be disputed, that the Constitution protects critical opinions, including those opinions, which part of society can perceive in excessively serious or inadequate way. Criticism towards government, including demand of change of form of government, its specific member or government in general cannot serve as ground for restriction of freedom of expression, assembly or manifestation.”¹² Under the newest practice of the Constitutional Court of Georgia,¹³ the regulation of content of expression represents one of the greatest restrictions on the freedom of expression and due to its proximity with political and public matters, requires a careful determination of its each element. Therefore, such regulation can only be made by the Parliament and the delegation of this authority to any other state body is, *per se*, principally erroneous. It thus follows that the Constitutional Court found the delegation of power to regulate the content of expression runs afoul of the Constitution.

⁸ Judgment of the Constitutional Court of Georgia, N1/1/468, 11.04.2012.

⁹ Judgment of the Constitutional Court of Georgia, N2/2/389, 26.10.2007.

¹⁰ Judgment of the Constitutional Court of Georgia, №2/482,483,487,502, 18.04.2011.

¹¹ Judgment of the Constitutional Court of Georgia, N1/3/421,422, 10.11.2009.

¹² Judgment of the Constitutional Court of Georgia, №2/482,483,487,502, 18.04.2011.

¹³ Judgment of the Constitutional Court of Georgia, N1/7/1275, 2.08.2019.

Summary:

- Freedom of expression is a cornerstone of a democratic society and an instrumental prerequisite to enjoy other constitutional rights and freedoms;
- Constitutional right to freedom of expression protects three main components: freedom of information, opinion and mass media;
- Constitutional right to freedom of expression protects free expression and dissemination of an opinion, its content and forms;
- State has an obligation not to hinder an individual to freely receive information, express their opinion and also, not to restrict mass media outlets with censorship;
- Constitutional right to freedom of expression protects not only information and ideas that are generally accepted by the society or those that are not offensive or there are indifferent feelings about it, but also it extends to information and ideas that that may be offensive, shocking and disturbs the state or certain groups of society;
- Restriction of the constitutional right to freedom of expression is only allowed if it pursues one of the legitimate aims enlisted in article 17.5 of the Constitution;
- Due to the importance of the freedom of expression, regulation of its content and determination of which information/opinion should be disseminated must be decided only by the Parliament, the delegation of this authority is prohibited.

Since the Constitutional Court of Georgia applies, among others, international instruments and jurisprudence when interpreting constitutional provisions, there is no material difference between its case law and the case law of international courts with respect to the protection of the freedom of expression.

II.III Right to privacy/right to respect for private life/right to private life

The right to privacy is protected by article 15 of the Constitution of Georgia (Right to personal and family privacy, personal space and privacy of communications). The first paragraph of this constitutional provision reads as follows: “Personal and family life shall be inviolable. This right may be restricted only in accordance with law for ensuring national security or public safety, or for protecting the rights of others, insofar as is necessary in a democratic society.” The second paragraph stipulates: “Personal space and communications

shall be inviolable. No one shall have the right to enter a place of residence or other possessions, or to conduct a search, against the will of the possessor.”

The right to privacy is not an absolute right and may be restricted provided it meets the conditions set out in article 15 of the Constitution. Under article 15.1, the right to privacy may be restricted only in accordance with law for ensuring national security or public safety, or for protecting the rights of others, insofar as is necessary in a democratic society. As for the right to personal space and communication, the article 15.2 of the Constitution provides that “[t]hese rights may be restricted only in accordance with law for ensuring national security or public safety, or for protecting the rights of others, insofar as is necessary in a democratic society, based on a court decision or without a court decision in cases of urgent necessity provided for by law. In cases of urgent necessity, a court shall be notified of the restriction of the right no later than 24 hours after the restriction, and the court shall approve the lawfulness of the restriction no later than 24 hours after the submission of the notification.”

The Scope of the Right to Personal and Family Privacy, Personal Space and Privacy of Communications according to Georgian Constitutional Jurisprudence

1. The Scope of the Right to Personal Privacy

Under the case law of the Constitutional Court of Georgia, the right to privacy guaranteed by article 15 of the Constitution represents the basis of independent development of an individual and is closely intertwined with the concepts of human freedom and dignity existent in a democratic society.¹⁴ The right to privacy implies the existence of a private sphere of an individual, the right of an individual to decide, independently from state or society, their place, attitudes and connection with outer world, and also, forge and develop relationships with other peoples, exchange information/ideas with them.¹⁵ According to the case law of the Constitutional Court of Georgia, the right to private life combines both positive and negative aspects. „On the one hand, the state has a positive obligation to respect the right to private life and effective enjoyment of this right, which primarily includes elimination of those conditions that restrict free development of an individual. On the other hand, the state has a negative obligation not to interfere with the enjoyment of this constitutional right and thus,

¹⁴ Ruling of the Constitutional Court of Georgia, №1/2/458, 10.06.2009.

¹⁵ Judgment of the Constitutional Court of Georgia, №1/3/407, 26.12.2007.

ensure the protection of an individual, from arbitrary interference with their private life by state bodies or officials.¹⁶

2. The Scope of the Right to Family Privacy

With respect to family privacy, according to the Constitutional Court, “it is undeniable that the right of an individual to privacy implies his/her connection and relationship with their family members and close relatives”. Family life includes the relationship that exists between spouses due to marriage or factual cohabitation, the right of an individual to develop connections with family members and biological relatives.”¹⁷ Therefore, under the jurisprudence of the Constitutional Court of Georgia, family life combines private relationships with certain individuals and implies connections in a ‘close circle’, which is characterised by genuine emotional and/or biological connection. The Constitutional Court also emphasised that the Constitution of Georgia specifically singles out the right to family life as a particular aspect of the right to privacy, significance of its protection goes beyond individuality frames and relate to other subjects of such relationships and also, to the society at large – this has a great importance in the value-system of the Constitution.¹⁸ In another case,¹⁹ the Constitutional Court decided on the right to private and family life of a prisoner in a penitentiary facility. The subject matter in that case related to the right of a prisoner to enjoy with a private meeting for an extended period of time. This right was denied to a certain category of prisoners. The Constitutional Court emphasised that imprisonment as a sanction by definition changes the legal reality of a prisoner, who has their fundamental right to liberty restricted. The Court indicated that the right to family life should also have different standards of protection to those individuals, who are in penitentiary facilities. A prisoner enjoys a *prima facie* right to develop and maintain family relationships in person or via distance communication channels. The Court underlined that such communications could not have a permanent character and also, the communications process could not be afforded the same protection standards of private life as to those people, who are not in a penitentiary facility. The Constitutional Court concluded that despite the Constitution does not afford the possibility of an imprisoned person to enjoy unrestricted communication with their family. Nevertheless, the imprisonment ought not to imply the absolute isolation of an individual to contact with their family members. It thus follows that the constitutional right to private and

¹⁶ Judgment of the Constitutional Court of Georgia, №1/2/519, 24.10.2012.

¹⁷ Ruling of the Constitutional Court of Georgia, №1/2/458, 10.06.2009.

¹⁸ Judgment of the Constitutional Court of Georgia, №2/1/704, 28.05.2019.

¹⁹ Judgment of the Constitutional Court of Georgia, №2/1/704, 28.05.2019.

family life determines the obligation of a state to ensure the possibility of a prisoner to a certain degree to enjoy/maintain contacts with their family. Under the law, the Court went on to elaborate, the right to family and private life of an imprisoned person implies the possibility of the latter to maintain relationships with their family to a degree that is adequate with the sanction of imprisonment measure and the legitimate aims it pursues.

3. The Right to Privacy of Communications

According to the Constitutional Court of Georgia, the protection of the right to private life extends to physical and moral integrity of an individual, to their name, personal data, home, family and sexual life, correspondence and telephone communications.²⁰ The Constitutional Court indicated the private life protects a private sphere of an individual, which implies specific territory, space (e.g. home, private car or other belongings), also, certain group of people, with whom an individual wishes to communicate, and issues anonymity or disclosure of which is their wish. In other words, a private sphere is created by an individual on their own and has a reasonable expectation that the issues of their choice will be anonymous, left out of the reach of those who are not part of that private sphere.²¹ It thus follows that the under Georgian constitutional jurisprudence, the privacy of communications protects both verbal and written communication, telephone, fax, Internet, electronic, postal or any other forms of communication. In addition, only under strict observance of the procedure determined by article 15 of the Constitution it is allowed to check personal belongings, body or clothing of an individual, to conduct search or intrusion into their property or ownership. The said procedure requires a prior court order for search or interference in private life (ex ante judicial oversight), or urgent necessity as prescribed by law that needs to be communicated with a court, which should warrant the legality of a measure (ex post judicial oversight). The constitutional text does not allow for any other way of interfering with the right to private life. In one case,²² the Constitutional Court elaborated upon the rationale behind the judicial oversight of search procedure and whether it was allowed to conduct search without judicial warrant. The subject matter concerned a regulation that in certain circumstances, provided for an absolute check-up of an imprisoned person by way of stripping away. The complainant indicated that this procedure contradicted the constitutional standards insofar no judicial controls existed, which would assess the legality of the

²⁰ Judgment of the Constitutional Court of Georgia, №1/3/407, 26.12.2007.

²¹ Judgment of the Constitutional Court of Georgia, №1/2/519, 24.10.2012.

²² Judgment of the Constitutional Court of Georgia, №2/4/665,683, 26.07.2018.

interference. The Constitutional Court primarily focused on the fact that different standards of private life apply to those in a penitentiary facility, also the expectation and standards of its protection. The Court further indicated that the judicial control of private life interference serves the purpose of ensuring a neutral person assesses the legality of an executive action and check whether it was necessary to interfere with this right. It is for a court to oversee a discretionary power of the executive in order to prevent the abuse or unreasonable application of this authority. Nevertheless, the Constitutional Court empathised that the necessity of a judicial oversight does not exist when the right to private life is subject to interference in all cases and a court is not required to assess individual circumstances of the case. Hence, despite the constitutional requirement of a judicial oversight, when the interference with the private life is always reasoned, a judicial approval becomes a formality, which under any factual consideration would have taken positive decision.

Summary:

- The right to private life under the Constitution of Georgia protects the private sphere of and individual for their life and development, also the right of an individual to decide, independently from state or society, their place, attitudes and connection with outer world, and also, forge and develop relationships with other peoples, exchange information/ideas with them;
- Under the constitutional right to private life, the state, on the one hand, the state has a positive obligation to respect the right to private life and effective enjoyment of this right, which primarily includes elimination of those conditions that restrict free development of an individual; on the other hand, the state has a negative obligation not to interfere with the enjoyment of this constitutional right and thus, ensure the protection of an individual, from arbitrary interference with their private life by state bodies or officials;
- The right to family life combines private relationships with certain individuals and implies connections in a ‘close circle’. Family life includes the relationship that exists between spouses due to marriage of factual cohabitation, the right of an individual to develop connections with family members and biological relatives;
- The right to privacy of communications protects both verbal and written communication, telephone, fax, Internet, electronic, postal or any other forms of communication. In addition, only under observance of the procedure determined by

article 15 of the Constitution it is allowed to check personal belongings, body or clothing of an individual, to conduct search or intrusion into their property or ownership;

- According to the case law of Constitutional Court of Georgia, there is no need for a judicial oversight to conduct search provided the right to private life is subject to interference in all cases and a court is not required to assess individual circumstances of the case.

Since the Constitutional Court of Georgia applies, among others, international instruments and jurisprudence when interpreting constitutional provisions, there is no material difference between its case law and the case law of international courts with respect to the protection of the right to private life.

II.IV Freedom of Religion

Article 16 of the Constitution of Georgia protects freedom of belief, religion and conscience. The paragraph 1 of this provision reads as follows: “Everyone has freedom of belief, religion and conscience.” The paragraph prescribes that “No one shall be persecuted because of his/her belief, religion or conscience, or be coerced into expressing his/her opinion thereon.”

According to the Constitution of Georgia, the freedom of belief, religion and conscience is not absolute and may be restricted only in accordance with law for ensuring public safety, or for protecting health or the rights of others, insofar as is necessary in a democratic society.

In line with the case law of the Constitutional Court of Georgia, the freedom of belief is an origin of an individual self-determination and it is essential for the formation of pluralistic society in a democracy. It implies the inner human freedom to independently define their religious, philosophical, moral-ethical directions of development, priorities, to live in a society with the ability of self-realisation and with this find their own self. It thus follows that the freedom of belief represents a basis for living in line with an individual’s opinions and feelings. In addition, the Constitutional Court indicated that due to its substance and purpose, it is impossible to exhaustively define the scope of freedom of religion; to determine every opinion/idea, feeling or religion that falls under its scope. Moreover, it is impossible to set out the criteria based on which the delimitation would be made between the issues that definitely come under the scope of protection and vice versa. The freedom of belief protects, on the one

hand, to hold beliefs, and on the other hand, to manifest these beliefs and to live in accordance with them. It also implies in its original sense, freedom to share, choose, and to attribute themselves with various beliefs without state interference (positive freedom), or to deny, change them (negative freedom) as part of *forum internum*. In this context, the violation of freedom of belief will be a result of any ideological, psychological and/or moral influence on a human being, threatening, and coercion to reject or change beliefs and/or adopt other beliefs. It is the position of the Constitutional Court the freedom of belief includes both religious and non-religious beliefs and thus, does not only mean religious freedom.²³ The Constitutional Court also established that the freedom of belief protects the right to conscientious objection. The basis for the conscientious objection is a belief, which forbids its followers to abridge on the human life. It follows that conscientious objectors, as a rule, refuse to serve in the forces with armament either in war or peace, because it inherently presupposes the use of force and hence to take human life. Therefore, the right to conscientious objection means not only the denial of military service in wartime, but also the rejection of military service in times of peace. It should be noted that beliefs and ideas that fall under the scope of the freedom of belief does not necessarily imply religious beliefs; it also extends, among others, to pacifist belief.

Summary:

- Freedom of belief is an origin of an individual self-determination and it is essential for the formation of pluralistic society in a democracy. It implies the inner human freedom to independently define their religious, philosophical, moral-ethical directions of development, priorities, to live in a society with the ability of self-realisation and with this find their own self;
- Freedom of belief protects, on the one hand, to hold beliefs, and on the other hand, to manifest these beliefs and to live in accordance with them. It also implies in its original sense, freedom to share, choose, and to attribute themselves with various beliefs without state interference (positive freedom);
- This constitutional right extends to the protection freedom to deny, change beliefs (negative freedom) as part of *forum internum*;
- Freedom of belief includes both religious and non-religious beliefs and is not identical to religious freedom;

²³ Judgment of the Constitutional Court of Georgia, №1/1/477, 22.12.2011.

- Freedom of belief also protects, among others, the right to conscientious objection.

Since the Constitutional Court of Georgia applies, among others, international instruments and jurisprudence when interpreting constitutional provisions, there is no material difference between its case law and the case law of international courts with respect to the protection of the freedom of belief.

II.V Prohibition of Discrimination

Article 11 of the Constitution of Georgia protects the right to equality. The paragraph 1 of this provision reads as follows: “All persons are equal before the law. Any discrimination on the grounds of race, colour, sex, origin, ethnicity, language, religion, political or other views, social affiliation, property or titular status, place of residence, or on any other grounds shall be prohibited.” The paragraph 2 prohibits discrimination on the basis of specific grounds, namely, on the basis of ethnic and religious affiliation or language. The paragraph 3 proclaims equality between men and women: “The State shall provide equal rights and opportunities for men and women. The State shall take special measures to ensure the essential equality of men and women and to eliminate inequality.”

According to the case law of the Constitutional Court of Georgia, the right to equality is not absolute, yet article 11 of the Constitution does not define any grounds for restriction. In line with constitutional jurisprudence, the right to equality may be restricted on the basis of valuable public (legitimate) interests, which may vary stemming from concrete legal relationships and forms of restriction.

According to the Constitutional Court of Georgia, the constitutional right to equality before law implies a general constitutional principle of equality. This means to guarantee equal conditions of protection for human beings. The degree of ensuring the equality before law is an objective criterion to assess the quality of democracy and the rule of law bound in human rights in a country. Hence, this principle represents both the basis and the purpose of a democratic state based on the rule of law.

Pursuant to the case law of the Constitutional Court of Georgia, every differentiation between materially equal persons does not represent discrimination. The said constitutional provision does not oblige the state to equalise in all cases materially equal persons, yet it allows for differentiation as in certain cases, even when legal relationships are closely identical, the

differentiated treatment might be necessary or inevitable. It thus follows that the Constitutional Court draws a line between discriminated differentiation and a differentiation based on objective scenario. Hence, the constitutional right to equality prohibits unequal treatment of materially equal persons without reasonable and objective reasoning or vice versa – it prohibits equal treatment of materially unequal persons. It follows that the interference with the right to equality happens when there is unequal treatment of materially equal persons or vice versa.

As for the material equality of persons, it is ascertained not generally, but with respect to specific legal relationship.²⁴ When there is an interference with the right to equality, the Constitutional Court applies one of the two tests: strict test or rational test. The former, according to the case law of the Constitutional Court, is used when either of the following prerequisites gains relevance: 1) ground for differentiation, or 2) intensity of differentiation. The strict test is utilised when the differential treatment exists on the basis of those grounds that are exhaustively referred in article 11 of the Constitution (“classic grounds” e.g. race, colour, sex, origin, ethnicity, language, religion, political or other views, etc.), or when the differentiated treatment is not based upon the classic ground, but there is a high intensity differentiation between materially equal persons. In order to determine the intensity of differentiation, it is decisive as to what extent the persons being equal in essence were placed significantly differentiated conditions, in other words, how distinctly the differentiation will separate equal persons from equal opportunities to participate in particular public relation.²⁵ The application of a strict test involves the assessment of reasonability of differentiated regulation between equal persons by means of proportionality analysis. This means whether the differentiation serves a valuable legitimate objective(s) and whether the means in question are appropriate, necessary and proportionate to achieve the legitimate goal(s). If the intensity of differentiation is not high and it is not based on classic grounds, the Constitutional Court applies the test of rational differentiation. Under the latter, it is sufficient to establish rationality of a differentiated treatment. This involves maximal reality, inevitability or necessity of differentiation, the existence of a real and rational link between the objective reason of differentiation and the effect of its operation.²⁶

²⁴ Judgment of the Constitutional Court of Georgia, N2/1/536, 4.02.2014.

²⁵ Judgment of the Constitutional Court of Georgia, N1/3/534, 11.06.2013.

²⁶ Judgment of the Constitutional Court of Georgia, N1/1/493, 27.12.2010.

In the recent case law of the Constitutional Court of Georgia, there was a case²⁷, where the Court elaborated on the extent of its role as a negative legislator in the definition of a way of discriminated treatment. The complainant in the mentioned case requested the declaration of unconstitutionality of a legal norm that did not restrict his/her right as such, but it was an enabling regulation with respect to other persons who were substantially equal to the complainant. Moreover, the complainant submitted that the rule should have been extended to him/her and other substantially equal persons to allow for the enjoyment of its benefits, and it did not want its invalidation. The Constitutional Court in its judgment went on to discuss the principle of separation of powers provided in the Constitution and its mandate. The Constitutional Court emphasised that it possesses the mandate to invalidate unconstitutional regulations, rules in the legislation and strike down any of their potential effects in view of human rights violation; whereas the authority to introduce any rules in legislation instead of unconstitutionally invalidated provisions goes beyond the Constitutional Court's mandate. Therefore, the Constitutional Court indicated that the complainant's request to empower him/her with a specific right goes beyond its mandate, since it involves the giving a different meaning of the regulation in question in order to extend its scope of application. The Constitutional Court also added that with respect to the right to equality it is entitled to invalidate the legal norm, or one or more of its meanings and not to introduce new regulation, which would have been identical to positive legislative rule. It thereby follows that as regards the right to equality, the Constitutional Court of Georgia refused to adopt the mechanism, for instance, 'reading in', as applied by the Supreme Court of Canada, to remedy the discrimination by affording a new, constitutionally compliant meaning to the disputed regulation.

Summary:

- The constitutional principle of equality does not imply total equalisation of substantially equal persons; yet its objective is not to allow unjustified differentiation between substantially equal persons, and similar treatment between unequal persons;
- The right to equality prohibits both direct and indirect discrimination;
- The assessment of differentiation is made by two tests: strict test or rational differentiation test;

²⁷ Judgment of the Constitutional Court of Georgia, N3/6/642, 10.11.2017.

- The strict test is applied when the differential treatment exists on the basis of those grounds that are exhaustively referred in the Constitution (“classic grounds” e.g. race, colour, sex, origin, ethnicity, language, religion, political or other views, etc.), or when there is a high intensity differentiation between materially equal persons. The application of a strict test involves the assessment of differentiated regulation by means of proportionality analysis;
- In every other case, the test of rational differentiation is utilised, which involves the existence of a real and rational link between the objective of differentiation and the means applied;
- According to the constitutional case law, the Constitutional Court of Georgia is entitled to invalidate the legal norm, or one or more of its meanings and not to introduce new, positive regulation.

Since the Constitutional Court of Georgia applies, among others, international instruments and jurisprudence when interpreting constitutional provisions, there is no material difference between its case law and the case law of international courts with respect to the prohibition of discrimination.

II.VI Right to Liberty

The right to physical liberty is protected under article 13 of the Constitution of Georgia. It reads as follows:

“1. Human liberty shall be protected.

2. The deprivation or other restrictions of liberty shall only be permitted on the basis of a court decision.

3. An official authorised by law may arrest a person in cases defined by law. An arrestee shall be brought before a court of competent jurisdiction no later than 48 hours after being arrested. If the court does not adjudicate upon detention or any other restriction of liberty within the next 24 hours, the person shall be released immediately.

4. A person shall be informed of his/her rights and grounds for arrest immediately upon being arrested. A person may request the assistance of a lawyer immediately upon being arrested. This request must be satisfied.

5. The detention period for an accused person shall not exceed 9 months.

6. A violation of the requirements of this article shall be punished by law. A person whose liberty has been restricted unlawfully shall have the right to compensation.”

The right to physical liberty of an individual is not absolute and may be restricted, nevertheless the concrete grounds thereof are not referred in the Constitution. According to the case law of the Constitutional Court of Georgia, the legitimate aims for restriction of the right to liberty may include the protection of judicial authority²⁸ and the administration of justice.²⁹ In addition, the Constitution of Georgia provides for an established procedure for the imprisonment, arrest or any other forms of restriction upon human liberty. In particular, these restrictions must be prescribed by law and authorised by a court, which is an ultimate decision maker in this regard.

Since the Constitutional Court of Georgia applies, among others, international instruments and jurisprudence when interpreting constitutional provisions, there is no material difference between its case law and the case law of international courts with respect to the right to liberty.

²⁸ Judgment of the Constitutional Court of Georgia, N1/3/393,397, 15.12.2006.

²⁹ Judgment of the Constitutional Court of Georgia, N2/1/415, 6.04.2009.