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SHORTCOMINGS AND CHALLENGES OF THE NEW EDITION OF THE CONSTITUTION OF GEORGIA**

INTRODUCTION

In the relatively brief history of the existence of the Constitution of Georgia since 1995, the year 2017 holds a special place. Even though relatively principled amendments were introduced to the Constitution previously (in 2004 and 2010), but with its extent, the constitutional law[1], adopted by the Parliament in 2017, significantly exceeds all previous amendments. These amendments were adopted by the parliament of Georgia on 13 October of 2017 by the constitutional law, which came into force on 16 December 2018, upon the oath of the newly elected president. It may be stated that from December 17, our country resulted in completely new legal constitutional reality, as provisions to the Constitution have changed so drastically in terms of content, structure, and quantity, that Georgia became a classical parliamentary republic, but the number of articles reduced from 109 to 78. Changes were introduced to all chapters of the Constitution, in particular the responsibilities of the president, parliament, and government. Slight changes were made to chapter 2 of the Constitution, provisions determining the fundamental rights and freedoms[2] of a person. Part of the amendments introduced in this chapter may be evaluated positively, as we can bring examples of recognizing namely fundamental rights such as academic freedom, physical inviolability, and access to the internet. Despite that, it is obvious that because of the changes, some gaps were encountered in several articles of the second chapter of the Constitution, which create serious legal constitutional challenges and provoke problems that may, on one hand, create difficulties in terms of the protection of human rights. The purpose of this article is to analyze the mentioned gaps and challenges and demonstrate to politicians, as well as to legal constitutionalists, the problems that are deriving from them, as these challenges may be responded to and the problems solved only by the proper changes in the Constitution.

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1 The Constitutional Law of Georgia on "The Amendments to the Constitution of Georgia", N1324, October 13, 2017.

2 Instead of the words, "Fundamental rights and freedoms of a person", the following words will be used, "Fundamental rights of a person" or "Fundamental rights".

ANALYSIS

Among the shortcomings of the new Constitution, first of all, we must mark out Article 71 ("State of Emergency and Martial law"), which is not included in the second chapter of the Constitution – "Fundamental Human Rights", but paragraph 4 of this article by essence, directly and substantially relates to fundamental human rights and determines the title of the State concerning the extent of the restriction of fundamental rights in a state of emergency and martial law. It is noteworthy, that in the old edition of the Constitution these provisions were covered by the second chapter ("Citizenship of Georgia Fundamental Human Rights and Freedoms") (Art. 46), by which the topic was decided more precisely in terms of systematic organization of constitutional norms. However, the main challenge of Article 71 is a completely different provision.

According to Article 71, during the period of a state of emergency and martial law, the president of Georgia (with the introduction of prime-minister) issues decrees having the force of organic law, which may ***"restrict"*** fundamental rights recognized by Article 13 of the Constitution (Freedom of Person), Article 14 (Freedom of Movement), Article 15 (Rights to Personal and Family Privacy, Personal Space and Privacy of Communication), Article 17 (Rights to Freedom of Opinion, Information, Mass Media and the Internet), Article 18 (Rights to Fair Administrative Proceedings, Access to Public Information, Informational Self-determination, and Compensation for Damage Inflicted by a Public Authority), Article 19 (Right to Property), Article 21 (Freedom of Assembly) and Article 26 (Freedom of Labor, Freedom of Trade Unions, Right to Strike and Freedom of Enterprise) (p. 4, s. 1).[3] In comparison to the standards applied periods of peace, according to which it is possible to restrict the fundamental rights of only a particular person, and only with the purpose of protecting particular public good/public interests (that are named in each article determining fundamental rights), this provision is the so-called common, general basis for restricting fundamental rights, based on which the State is entitled simultaneously to restrict several rights, and this restriction may apply not only to one, but all persons living in a particular territory (where a state of emergency is declared) or throughout the whole country, in other words, in general to everyone at the same time (for instance, assembly and manifestation, strike, transportation/movement, access to public information, etc.[4]). Naturally, such restrictions are justified by a state of emergency and martial law existing in the country, when the constitutional order, state, public security, life and health of the people is under threat. In such circumstances, the restriction of fundamental rights is "necessary for a democratic society" and the purpose of the restriction is to ensure and protect these crucial constitutional benefits. It is noteworthy, that during a state of emergency and martial law, the old edition of the Constitution envisaged such interrelation between fundamental rights and the State – com-

3 "The decree enters into force from the moment of issuance. The decree is immediately presented to the Parliament. The Parliament approves the decree upon assembly. If the Parliament does not approve the decree, the latter loses its legal force at the time of voting" – Art. 71, para. 3.

4 These restrictions are determined by the law of Georgia on "State of Emergency" (October 17, 1997) and "State of Martial Law" (October 31, 1997).

mon (general) restriction for ensuring constitutional benefits. The fundamental rights, which may have been restricted during a state of emergency and martial law, were similar to the new edition.

Aside from the abovementioned similarities, nothing is in common between the old and new editions of the Constitution, as by the new edition of Article 71, a completely new model of the interrelation of fundamental rights and the State enters into constitutional space – the president has the right not only to restrict, but to also "suspend" the effect of human rights. In general, the institute of suspension of a norm is not unfamiliar to the Georgian legal system. For instance, according to the organic law on "Constitutional Court of Georgia",[5] if the constitutional court considers that the effect of a normative act may result in irreparable outcomes to one of the parties, the plenum of the constitutional court is entitled to suspend the effect of the whole normative act or a part thereof, before the final decision on the case (or for lesser period) (Art. 25, para. 2). In addition, "irreparable outcome means such a condition, when the effect of the norm may result in an irreversible violation of the right and restoration of the result will be impossible even in the case of declaring that norm as unconstitutional."[6] As we see, the purpose of suspending the norm is to protect fundamental human rights, and the suspension is related to such norms (normative acts), the effect of which may violate fundamental rights. As for the suspension of the effect of human rights, as it is proposed by Article 71 of the Constitution (para. 4, sent. 2), this is a novelty for Georgian constitutional law.

While discussing the mentioned novelty, first of all, we must point to the necessity – whether there was a need for such an amendment deriving from the norms of the Constitution themselves or the 23 year long (by 2018) constitutional reality of Georgia. Since the adoption of the Constitution of Georgia (August 24, 1995), the model existed, according to which, during a state of emergency and martial law, it was possible to restrict several rights by presidential decree. Moreover, in 1997 a law on a state of emergency and martial law was adopted, which determined the range of the restriction of fundamental rights in such conditions and respective entitlements of the State. With this unity of constitutional and legislative norms, the legal framework was created, in which the State could make decisions quickly and act operatively to ensure state and public security, protect legal order and lawfulness. The constitutionality of the named laws was never a subject of revision by the constitutional court. Therefore, there was no need for a mechanism suspending fundamental rights in the Constitution and the old edition of the Constitution completely protected the balance between such constitutional benefits as fundamental rights and guarantees for state security and defensive capacity.

With regard to the discussible amendment, its scope of applicability is noteworthy – in particular, which provisions may be suspended during a state of emergency or martial law. This issue is formed in a controversial and illogical manner – from the six articles which are subject to suspen-

5 January 31, 1996.

6 See records of the judgments of the Constitutional Court of Georgia on case N1/3/452,453 from May 20, 2008 "Georgian Yong Lawyers' Association and Public Defender of Georgia against Parliament of Georgia", II-2; Also see Liluashvili, Givi 2018, "Standard of suspension of effect of the Normative Act (according to the practice of the Constitutional Court of Georgia)", in the Journal: "Review of Constitutional Law", p. 15-30.

sion, for three of the articles, only those paragraphs may be suspended which entail a model of restriction of the respective fundamental right in essence (paragraphs 2-6 of Article 13, paragraph 2 of Article 14 and paragraph 3 of Article 19). For the rest of three articles, there may be suspended those paragraphs which determine the content of fundamental rights, as well as those paragraphs that define a model for the restriction of these rights (paragraph 2 of Article 15 (Right to Personal Space and Communication, the Privacy of Dwelling or Other Possessions), paragraph 3 of Article 17 (Freedom of Mass Media), paragraphs 5 and 6 and paragraph 2 of Article 18 (Right to Access Public Information)). As we see, the illogical nature and controversy of the structure of this norm is obvious, however, it is hard to investigate the reason.

This controversy becomes more obvious while discussing the occasions when "suspension" relates to restrictive provisions of the listed fundamental rights. As an example, we can site Article 19 ("Right to Property"), which may be **restricted** (para. 4, sent. 1), and paragraph 3 of the same article may be **suspended** as well (para. 4, sent. 2). According to this paragraph, it is admissible to expropriate property for the vital public necessity (a) in cases directly prescribed by the law, by the court decision or (b) in case of urgent necessity stipulated by the organic law, with prior, complete and fair compensation. Compensation in all cases is exempt from "*any taxes or fees*". In line with this provision in Georgia, there is in force a law on "the Procedure for The Expropriation of Property for Pressing Social Needs"[7] and the organic law on "the Procedure for Deprivation of Property for Pressing Social Needs".[8] The organic law determines the meaning of the condition "urgent necessity" (Art. 2).[9] The law also stipulates that *"in case of declaring a state of emergency or martial law, the decision on expropriating property for social need with prior, complete and fair compensation is made in line with the legislation of Georgia in a state of emergency and martial law"* (Art. 5). Before it was already mentioned that the legislation on a state of emergency and martial law is created by the respective norms of the Constitution of 1995 and corresponding laws,[10] enacted from 1997 and determine entitlements of the State. Furthermore, the cited Article 5 of the organic law imperatively stipulates, that even in a state of emergency and martial law, the expropriation of property may be carried out only with prior, complete and fair compensation. Considering all of this, it is clear that the legal grounds for the expropriation of property during a state of emergency and martial law is outlined in the Constitution of 1995 with respective provisions (Articles 21 and 46 of the old edition),[11] also by the laws being in force from 1997 on a state of emergency and martial law and organic law on "the Procedure for Deprivation of Property for Pressing Social Needs". Therefore, the State is obliged to act in this legal framework and the new norm of paragraph 3 of Article 19 of the Constitution on "suspension of the effect" (Art. 71, para. 5, sent. 2) does not change or improve

7 This law defines the rules and procedure for expropriating property in peaceful circumstances, adopted on July 23, 1999.

8 November 11, 1997.

9 "Urgent necessity is a condition when, because of the threat deriving from a state of emergency or martial law, ecological catastrophe, natural disaster, epidemics, epizootics, human life and health, state and social security are endangered."

10 See p. 3, footnote 5.

11 From the date of adoption of the Constitution, Article 21 recognized the right to property, the procedure for its restriction and expropriation was determined, and Article 46 determined those fundamental rights (including the right to property), which were subject to restriction during a state of emergency and martial law.

anything (if this was the idea of the legislator of the 2017 amendments) with regard to state entitlements. On the contrary, this norm is excessive, causes misunderstanding in terms of legislative technique and creates constitutional law problems.

Another big problem which is entailed in this provision of the Constitution (Art. 71, para. 4, sent. 2) is the assumption that the effect of fundamental rights themselves may be "suspended". This term, grammatically, as well as legally, implies cancelation of legal force of the existing norm (even if this suspension is temporary), which directly contradicts the main essence of fundamental rights, according to which fundamental human rights are natural rights. They are directly applicable, objective laws, binding state, and these rights are available to a human only because he/she is human. Sometimes a right is attained to the fetus already in the uterus of a mother (dignity, right to life), while others are originated upon birth. Therefore, these so called "pre-state" rights may not be attained by the State or any other social, territorial entities, and a fortiori, cannot be removed from the person. On the contrary, the idea of a modern legal state is in the binding of the State with human rights. Moreover, the Constitution of Georgia recognizes fundamental rights as "eternal and supreme human values" and declares that not only the State while exercising power, but also people are restricted (bound) by these rights (Art. 4, para. 2).[12] The basis of the constitutional order of democratic and legal states are fundamental rights, and the "suspension" envisaged under the provision in question practically equals to confiscation of fundamental rights by the State, which contradicts the principle of a legal state, and therefore, the entire constitutional order.

Alongside the mentioned, we must point to one more condition: In constitutional law it is universally acknowledged that fundamental rights may only be "restricted". This is evidenced by the vast majority of constitutions of democratic states. The exception is in a number of countries (including Portugal, Spain and Hungary), the constitutions of which entail the term − "suspension", but in the theory of constitutional law the idea of the concept of restriction of fundamental rights is also shared – a democratic and legal state even in a state of emergency or martial law, must act in the framework of constitutional order, the basis of which are fundamental rights. It is inadmissible that the State exceeds this framework, declare invalid the fundamental rights and act arbitrarily, without any binding, according to its point of view. Therefore, deriving from this concept, fundamental rights apply and bind the State even in a state of emergency and martial law, and the State is obliged to interfere in a protected sphere of fundamental human rights taking into account the legitimate purpose, attaining which is the aim of interference. With regard to the model of restricting rights in peaceful conditions, the only difference is that because of a state of emergency or martial law the State has the possibility interfere into the protected sphere of simultaneously several (hundred, thousand or even more) particular fundamental human rights more intensively and widely.[13] Be-

12 "The State acknowledges and protects commonly recognized human rights and freedoms, as eternal and supreme values. While exercising its power, the State and people are restricted with these rights, as with the directly applicable law." – Art. 4, para. 2, sent. 1,2.

13 See Article 2, paragraph 2 of the Law of Georgia on "State of emergency", according to which state agencies are entitled: to prohibit people to leave their dwellings s or other residences without proper permission (sub. para. "d"), prohibit assemblies, political rallies, street movements and demonstrations, as well as conducting spectacular, athletic and other mass events (sub. Para. "f"), prohibit strikes (sub. Para. "k"), introduce special rules for using communication means (sub. para. "p"), restrict movement of public transportation and inspect them (sub. para. "q").

sides, the intensity of interference may be expressed not only with the number of people, but also with radicalism, when, for instance, for the breach of curfew the police arrests person for 72 hours, without court permission.[14] An approximately similar provision is included in the Basic Law of Germany, which stipulates that during a state of emergency or martial law, the period of the arrest of a person without court permission shall not exceed 4 days[15] (Whereas during peaceful conditions, the person shall be presented to the court not later than on the second day from arrest, and the judge must immediately render a decision on his/her imprisonment or release).[16]

The groundlessness and problematic nature of the fundamental rights' "suspension" model is more obvious with one guarantee – inviolability of the essence of rights and freedoms. This guarantee is recognized in the theory of human rights and is nominally depicted in the constitutions of several states (Germany, Switzerland, Portugal), and in Georgia it is established by the practice of the constitutional court.[17] According to the mentioned guarantee, during the restriction of a fundamental right, the State shall not humiliate the essence of this right. In the "essence" the binding legal power of the State is implied, by which the fundamental right forces the State to fulfill any obligation. Therefore, the essence is humiliated and the right "exhausted" in the case when the determination of the State's legal power of binding and force will depend on any particular state body itself.[18] For instance, the essence of the fundamental right to dignity is humiliated by torturing a person, constant isolation and inhumane treatment. The essence of academic freedom is humiliated by prohibiting publication of research and scientific works. The essence of the fundamental right to property entails using property according to personal interests and its disposition corresponds to the free will of the owner.[19] The Basic Law of Germany specifies this when it declares that "*the essence of the fundamental right shall not be humiliated in any case*" (Art. 19, para2).[20] The same is pointed out in the Constitution of Switzerland: "*The essence of fundamental rights is inviolable*" (Art. 36, para 4).[21] According to Article 18 of the Constitution of Portugal, while restricting rights,

14 See Article 7, paragraph 2 of the Law of Georgia on "State of Emergency".

15 See Basil Law of Germany, Article 115 (c), para.2, sub.para.2, "Constitutions of Foreign States", Part III, p. 123, 2006; see also Law of France on "State of Emergency" (Loi n°2015-1501, November 20, 2015, www.legifrance.gouv.fr), which declared admissible home imprisonment and leg search of dwelling without court's permission towards those people whose action represents a threat to security and public order (Art. 4) (In German – Information platform Human Rights.ch)

16 See Basil Law of Germany, Article 104, and para. 3," Constitutions of Foreign States", part III, p.113, 2006.

17 See decisions of the Constitutional Court of Georgia on cases: "Ltd. "Rusenergoservice", Ltd. Patara Kakhi", JSC "Gorgota", individual company "Farmer" of Givi Abalaki and Ltd. "Energy" v. the Parliament of Georgia and the Ministry of Energy of Georgia", II-24, 26, December 19, 2008; "Citizen of Denmark Haike Kronqvist v. the Parliament of Georgia", II-57, June 26, 2012; "Ltd. Giant Security" v. the Parliament of Georgia and the Ministry of Internal Affairs of Georgia", II-47, December 14, 2018; "Ltd. SKS" v. the Parliament of Georgia", II-33, April 18, 2019.

18 See Hesselberger, D., Das Grundgesetz, p. 168; Sachs, M. (Hrsg.), Grundgesetz Kommentar, p. 596-600.

19 This was noted by the Constitutional Court of Georgia with regard to the right to property in its decision on the case Ltd. "Rusenergoservice", Ltd. Patara Kakhi", JSC "Gorgota", individual company "Farmer" of Givi Abalaki and Ltd. "Energy" v. the Parliament of Georgia and the Ministry of Energy of Georgia" (December 19, 2008). During deliberation of this case, it appeared that by the order of the Minister, owners were practically removed from activity base on their property and could not use their assets with direct purpose. This in reality was "exhaustion" of the right, and the Court noted that "the owning of property loses its sense if the material rights of the subject become drained from content. The essence of property is guaranteed when the owner can completely implement rights considered in the property in accordance with the will determined by the function of object of the property", II-26.

20 See Basic Law of Germany, Art. 19, para. 2, "Constitutions of Foreign States", part III, p.73, 2006; „In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden" (Art. 19.2), GG, Grundgesetz, 2019.

21 „Der Kerngehalt der Grundrechte ist unantastbar" (Art. 36.4), Bundesverfassung der Schweizerischen Eidgenossenschaft, www.admin.

freedoms and guarantees, their essence must be preserved (para. 3).[22] As for Georgia, it was already mentioned that the Constitutional Court underlined the significance of guarantees many times and proclaimed: fundamental right "… *may be restricted for reaching legitimate public purpose, by protecting proportionality principle, so that the essence of the right is not violated*,"[23] and in all cases "*the exhaustion of the main essence of the protected sphere of the right itself must be avoided*".[24] Hence, its completely obvious that the constitutional legal guarantee of "inviolability of essence" of fundamental rights and freedoms is roughly infringed by introducing a "suspension" mechanism in the Constitution of Georgia, as "suspension" causes not only the cancellation of the essence of fundamental rights, but also of legal force of entirely all fundamental rights and freedoms, their extraction (even temporarily), which contradicts the principle of legal state and grounds of the constitutional order of Georgia.

Based on the summary of the abovementioned analysis, it may be said that the concept of "restricting" fundamental rights in a state of emergency or martial law, on one hand, fully complies with the essence of fundamental rights with its legal content, on the other hand in the framework of this concept. In reality, the State has the possibility to effectively act and ensure constitutional order and public security. As for the novelty introduced to the constitutional law of Georgia, by virtue of Article 71 paragraph 4 sentence 2 – the model of "suspension" of fundamental rights, it is unacceptable for the constitutional order of Georgia.

2. By the constitutional law of 13 October 2017, the structure and partial content of that article were amended, by which the freedom of belief, religion and conscience. In the new edition of the Constitution, these fundamental rights are presented in Article 16 and contain 3 paragraphs. The first paragraph recognizes these freedoms. In paragraph 2, the construction of restricting freedom of belief, religion and conscience is given. According to paragraph 3, it is prohibited to persecute anybody because of his/her belief, religion or conscience, or be coerced into expressing his/her opinion thereon. In this article, we will concentrate on the freedom of belief and religion (hereinafter: freedom of belief), their significance and shortcomings of Article 16, which represents a crucial constitutional legal problem.

In human rights law, the freedom of belief is considered one of the most important fundamental rights of a person. It is recognized by all international acts on human rights and by the constitutions of all democratic states. Freedom of belief has a special significance for the development of a person, as an independent and free individual, as it protects the sphere related to deep inner feelings and emotions of a single person, which is the ground for a democratic social system. This signifi-

ch; See also Haller , V. , p. 195, 2012; Federal Constitution of the Switzerland Confederation, "Constitutions of Foreign States", part I, p. 563, 2008.

22 See the Constitution of Portugal: „Laws that restrict rights, freedoms and guarantees must have a general and abstract nature and may not have a retroactive effect or reduce the extent or scope of the essential content of the constitutional precepts" (Art. 18.3), www.dre.pt.

23 See the decision of the Constitutional Court of Georgia on the case "Ltd. Giant Security" v. the Parliament of Georgia and the Ministry of Internal Affairs of Georgia", II-47, December 14, 2018.

24 See the decision of the Constitutional Court of Georgia on the case "Citizen of Denmark Haike Kronqvist v. the Parliament of Georgia", II-57, June 26, 2012.

cance was underlined by the Constitutional Court, when it declared that "… freedom of belief is the support for personal development and autonomy of a person, at the same time, it determines the entire architecture of society, defines its quality of democracy."[25] The significance of the freedom of belief, the specialty of its essence is expressed by the fact that, unlike some other fundamental rights, it is inadmissible to restrict it during a state of emergency or martial law, which is taken into account by democratic constitutions in states, and as discussed above, in Article 71 paragraph 4 of the Constitution of Georgia.

Freedom of belief entails religious, as well as non-religious beliefs. According to the definition of the Constitutional Court "… beliefs and views, which represent the grounds for honest resistance, must not be of religious nature."[26] The freedom of belief protects the inner freedom (*forum internum*) to independently form and determine personal religious or non-religious (atheistic) beliefs with regard to the existence of people, personal relation to supreme forces (god), as well as the external freedoms of person (*forum externum*) to implement, publicly express and spread his/her belief and decisions made based on that belief.[27] Deriving from this definition, the freedom of belief protects human rights to live, act and proceed his/her entire activity in accordance with the rules-customs of his/her religion (or non-religious, ideological views) and personal inner faith. Moreover, it protects such means of execution and expression of belief such as mass, prayer, processions, church gatherings, religious or ideological celebrations and customs, diverse cultic activities, non-religious, atheistic feasts, etc.

Despite the special significance of freedom of belief, it is not an absolute right and may be restricted in line with the law, for the purpose of protecting/ensuring goods having particular public significance for a democratic society. Here we see one more sign of specialty of this fundamental right, namely that it is inadmissible to restrict the first part of the freedom of belief – inner freedom. In human rights law, this specificity of freedom of belief is the common standard. It is recognized by world scientific groups and the consistent practices of supreme and constitutional courts. If we observe closely, it cannot be any other way – each person individually creates his/her own attitude and belief, only he/she knows why he/she believes this way and not the other way round. This sphere is so deep, intimate, deriving from one's inner attitude towards supreme forces or god, so it is impossible that there is any public, legitimate purpose, which justifies and admits interference of the State. Therefore, ***inner freedom of belief is absolutely protected*** and any interference in this sphere represents unjustified restriction. Accordingly, only external freedom of belief may be restricted, in other words, the public execution of decisions deriving from inner belief, their expression and implementation (freedom of confession). This particularity of the freedom of belief is explicitly indicated in constitutions of democratic states (for instance, Estonia, Poland, Finland, Netherlands, Serbia, Slovakia, Latvia, Czech Republic), also in international documents, such as the International

25 See the decision of the the Constitutional Court of Georgia on the case "Public Defender of Georgia v. the Parliament of Georgia", II-7, December 22, 2011.

26 See Ibid, II-17.

27 See also the definition of content of freedom of belief in the decision of the Constitutional Court mentioned above, II-5, 6, 12, 13.

Covenant on Civil and Political Rights of the UN[28] (hereinafter – the International Covenant) and the Council of Europe Convention on the Protection of Human rights and Fundamental Freedoms[29] (hereinafter – the European Convention). According to Article 18 of the International Covenant and Article 9 of the European Convention, the freedom of religion (belief) is recognized, and paragraphs 3 (International Covenant) and 2 (European Convention) of the same articles admit the restriction of only external freedom of belief: "freedom to manifest religion or belief shall be subject only to such limitations as…".[30] It must be noted, that the old edition of the Constitution of Georgia shared this content of the freedom of belief and made it admissible to restrict freedom of belief only in case of its "*manifestation*": "It is inadmissible to restrict rights listed in this article if their manifestation does not infringe on others' rights" (Art. 19, para. 3).[31]

Based on the analysis presented above, while evaluating Article 16 of the new edition of the Constitution of Georgia, we must pay attention to the interrelation of paragraphs 1 and 2. According to paragraph 1, "each person has freedom of belief, confession and conscience", and by the second paragraph, "restriction of these rights is admissible only in line with the law, with the purpose to ensure public security necessary in the democratic society, protect health or rights of others."[32] By themselves, these provisions are legally completely coherent and semantically easy to understand. Nearly the same is the model of restriction for all other fundamental rights. Therefore, while restricting the freedom of belief, the State is obliged to act consequently to the necessity of democratic society, only with the procedure prescribed by law and for protecting/ensuring at least one from the mentioned legitimate purposes. However, despite such arranged interrelation between these provisions, the shortcoming is obvious. Based on paragraph 2, the State has the right to restrict the absolutely protected internal freedom of belief (forum internum). The presented provision brings into the framework of restriction entirely the freedom of belief and not only the external freedom of belief, and as a result restriction of this freedom may be used on the person "by ideological, psychological and moral influence, threatening, forcing" with the aim to make him/her "refuse particular belief, change it (and share some other belief).[33] Such a thing is inadmissible in any case, only because it is impossible to have a condition when, for instance, for the purpose of "ensuring

28 Adopted on December 16, 1966, effective from 23 March 1976.

29 Adopted on November 4, 1950, effective from 3 September 1953.

30The International Covenant, Article 18, para. 3, the European Convention, Article 9, para. 2 (It is noteworthy, that provisions restricting discussed rights in these documents are identical word by word).

31 The particularity similarly as to freedom of belief is also characteristic to freedom of creativity (same as freedom of art), which is recognized by Article 20 of the Constitution (Article 23 of the old edition). In the first paragraph, the Constitution declares that the freedom of creativity is ensured, and in the second paragraph, it imperatively prohibits interference into the creative process, and considers inadmissible the censorship in the field of creative activities. Deriving from these provisions, it is clear that the substantial part of the freedom of creativity, which is related to creative ideas of an author, his/her fantasies and imaginations, as well as process of their realization, is absolutely protected from interference. The constitution considers it admissible to restrict only that part of freedom of creativity, which is called "dissemination of creative work", based solely on the decision of the court and only when "dissemination of creative work infringes on the rights of others" (Art. 20, para. 3).

32 It is interesting that according to the old edition of the Constitution, restriction was admissible only for the purpose of protecting others' rights (Art. 19, para. 3). Currently, the acting edition widens the scope of protection of freedom of belief; However, it does not exceed the scope established by the European Convention – according to Article 9, paragraph 2 of the Convention, the purpose of restriction may be in protecting public security interests, public order, health or moral and/or rights and freedoms of others.

33 The decision of the Constitutional Court of Georgian on the case "Public Defender v. the Parliament of Georgia", II-12, December 22, 2011.

public security" or "protecting health", the State will be obliged (or even entitled) to force a person to change his/her belief. Such action of the State will never be justified and will not be considered as a restriction proportionate to the essence of the inner freedom of belief. Such admission directly contradicts the essence of freedom of belief, the International Covenant (art. 18, para. 3) and the European Convention (art. 9, para. 2), as well as the practice of the European Court and the Constitutional Court of Georgia. As mentioned above, these international documents and court decisions consider it admissible to restrict freedom of belief only during its "manifestation", "expression", i.e. while acting based on internal freedom of belief. According to the definition of the Constitutional Court, "rough, excessive treatment, which causes changes the mind thinking process of a human, instigates spiritual suffering of the human." Hence, the court pointed to absolute inadmissibility of such interferences and declared that "Article 19 of the Constitution[34] "envisages absolute protection of a human's internal sphere, his/her inner world…".[35] As for the European Court, the decision on the case "Darby v. Sweden" is important, where the court considered as inadmissible interference in the forum internum of the freedom of belief those norms of Swedish law, which forced the claimant to pay a special tax to the State church of Sweden, despite the fact that he was not attached to that church.[36]

Hence, after discussing the provisions of Article 16 of the Constitution, we can conclude that the acting edition of the article contradicts the essence of freedom of belief in a constitutional legal perspective, which requires immediate action from the State and respective amendments in the Constitution.

3. Under the new edition of Article 15 of the Constitution, the fundamental rights to personal and family privacy, personal space and privacy of communication are recognized. In the first paragraph, personal and family privacy, and in the 2nd paragraph, personal space and privacy of communication are guaranteed. These rights have substantial significance concerning the development and self-realization of a person. According to the definition of the Constitutional Court of Georgia, the right to "privacy of personal life, alike to all other rights, is the expression of human's dignity…" it "is vitally necessary for person's freedom, individuality and self-realization, facilitating its complete usage and protection are substantially determining for the development of democratic society."[37] Besides, the privacy of personal and family life recognized by the first paragraph is directly connected to the right of person's free development (Art. 12), which is broader and entails diverse spheres, differentiated by particular signs, of personal and family life, personal relationships and activity. Because of such comprehensive interrelation in its content, the Constitutional Court defined that Article 15 of the Constitution (Article 20 of the old edition) "*does not entail all aspects of the right to personal life*".[38] The court shared the position of the European Court of Human rights, that it is

34 In the old edition of the Constitution, freedom of belief was recognized by Article 19.

35 The decision of the Constitutional Court of Georgian on the case "Public Defender v. Parliament of Georgia", II-12, December 22, 2011.

36 See the decision of the European Court on Human Rights on the case "Darby v. Sweden", September 24, 1990.

37 The decision of the Constitutional Court of Georgia on the the case "Georgia's Yong Lawyers Association and citizen of Georgia Tamar Chugoshvili v. the Parliament of Georgia", II-2, October 24, 2012.

38 See the ruling of the Constitutional Court of Georgia on the case "Citizens of Georgia Aleksandre Macharashvili and Davit Sartania v.

impossible the accurately and comprehensively define the personal life of humans: "The court does not consider it possible or necessarily exhaustive, to define the concept of "personal life"."[39]

Despite the fact that privacy of personal and family life has special significance for each person's thorough development ("*the constitutional right of personal life represents inseparable part of the freedom concept*"[40]), it is not an absolute right, which is envisaged by the Constitution of Georgia and allows its restriction. However, at the same time, it stipulates strict prerequisites for the restriction: "restriction of this right is admissible only in accordance with the law, for the purpose of ensuring state or public security necessary in a democratic society or protecting others' rights" (arc. 15, para. 1, and sent. 2). According to these circumstances, the State may interfere into the sphere protected by the right to privacy of personal and family life (restriction of fundamental right) – (a) only in accordance with the law and (b), only with the purpose of ensuring state or public security necessary in a democratic society or protecting others' rights. Legally, this provision is stipulated correctly and clearly, however, a serious shortcoming is evident: It does not require one more extremely necessary prerequisite for state interference into the protected sphere – the court permission. So this gives the possibility for the State, to interfere into the sphere protected by the right to personal and family life only by the decision of police or other respective body, without judicial control. This construction of restriction of the right creates a very big threat that the State may exceed the scope established by the fundamental right, and act arbitrarily, which cannot be evaluated by the court anymore, which may result in the unjustified action of the State and possible violence against a person's personal and family life sphere. The issue of the significance that the Court decision will have while interfering into the protected sphere, as the mechanism for controlling state actions, was clearly and explicitly evaluated by the Constitutional Court, which declared: "…restriction of right based on the court decision is an important constitutional guarantee as for protecting the right itself, as well as for balancing private and public interests."[41]

It is noteworthy that in Article 5, paragraph 2 of the Constitution, the significance of the court decision is envisaged. According to this paragraph, the fundamental rights to privacy of personal space and communication are recognized and their restriction is admissible in case when it is done (a) only in line with the law, (b) only with the purpose of ensuring state or public security necessary in a democratic society or protecting others' rights and (c), only by the court decision. Herein it is mentioned that restriction may also be applied without court decision "in case of urgent necessity prescribed by the law", but the court must be notified within 24 hours from the application of restriction, and the court deliberates on the lawfulness of the restriction and decides not later than in 24 hours from the receipt of the application.[42] As you see, the standard of restricting fundamental

the Parliament of Georgia and the Ministry of Justice of Georgia", II-21, June 10, 2009.

39 See "Niemitz v. Germany", December 16, 1992, "Costello-Roberts v. the United Kingdom", March 25, 1993; Also see, "Georgia's Yong Lawyers Association and citizen of Georgia Ekaterine Lomtatidze v. the Parliament of Georgia", December 26, 2007.

40 The ruling of the Constitutional Court of Georgia on the case "Citizens of Georgia Aleksandre Macharashvili and Davit Sartania v. the Parliament of Georgia and the Ministry of Justice of Georgia", II-21, June 10, 2009.

41 The decision of the Constitutional Court of Georgia "Georgia's Yong Lawyers Association and citizen of Georgia Ekaterine Lomtatidze v. the Parliament of Georgia", December 26, 2007.

42 By itself, this provision is erroneous, as the sentence is formulated as follows: "In case of urgent necessity the court must be notified

rights recognized by paragraphs 1 and 2 of Article 15 are similar word by word. The only difference is that while restricting the right to personal and family life, the court decision is not envisaged. The reason for such controversy of these provisions is unclear, as it is impossible to find out what is the deep and principal difference between these fundamental rights that in case of restricting one of them the judicial control of state actions is not necessary.

With regard to the issue under discussion, one more condition must be underlined, which relates to the old edition of Article 20 of the Constitution. From the date of the adoption of the Constitution, the right of privacy to personal life, private activity and personal space were recognized by this article. It comprised two paragraphs (as Article 15 currently in force) and the first one included the right to personal life, private activity and communication, and the second one – right to privacy of personal space. In both paragraphs, it was underlined that these rights could be restricted only with the decision of the court.[43] Therefore, when restricting these rights, the decision of the court, as a necessity of the important constitutional guarantee of protecting human rights, was established by the Constitution from the beginning. Once more this proves the problematic nature of the new edition of Article 15 of the Constitution.

CONCLUSION

Several months have passed since the enactment of the amendments to the Constitution of Georgia introduced in 2017, but more time is needed for their study and analysis. Society will see outcomes of these amendments in some time, in parallel with the practical application of the new edition of the Constitution. However, before that, I think, it would be better for Georgian constitutionalists to express their views on the positive and negative aspects of these amendments. The analysis presented in this article is related to one particular part – the new edition of provisions on human rights and freedoms. Each principle, norm and provision have great significance for the coherent functioning of a democratic and legal state, but human rights are most important among them. The legislator pays special attention to formulating this part of Constitution content-wise, also grammatically and editorially unequivocally and clearly. Any mistake in this sphere may create significant challenges in terms of protecting human rights in the country. This is the reason for

no later than 24 hours, which approves the legality of restriction within 24 hours." It appears that the court approves legality of restriction automatically. The record is so imperative that it does not allow illegal restriction even theoretically, and even more, the court deliberation is not necessary as well, it must formally agree to the police or other body, which is definitely legal lapse. This sentence must be amended necessarily, and it must be stipulated that the court deliberates the legality of restriction and decides respectively.

43 "1. Personal life, private activity place, personal recording, texting, telephone talk and messages received by means of any other technical or untechnical means, are indefeasible. Restriction of such rights is admissible by the court decision or without it, in case of urgent necessity prescribed by the law.
2. 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, if there is no court decision or urgent necessity prescribed by the law." – Art. 20 (old edition of the Constitution).

presenting in this article-- those shortcomings of particular provisions on human rights, which are visible and their elimination is necessary as each shortcoming of the Constitution represents the problem of constitutionalism and puts in danger the free development of people, democratic functioning of constitutional bodies and entirely constitutional order.

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