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PRINCIPLE OF PRESERVING THE ESSENCE OF FUNDAMENTAL RIGHTS

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I. REGARDING THE INTERRELATION BETWEEN THE ESSENCE OF FUNDAMENTAL RIGHTS AND ESSENCE OF RIGHT-HOLDERS

Right-holders can have as many rights as their essence allows to. In other words, the essence of the right depends onto the essence of the right-holder. Accordingly, there are right-holders and their rights, scope of which is not circumscribed by national legal orders. Fundamental rights of the individual are so-called as rights of the "citizen of the world". They do not owe their existence to legal orders. Fundamental rights are related to the existence of a human being. If they had their origin in national legal orders, their claim to universality would be unfounded. None of the rights linked to any particular legal order may be perfect and exhaustive, as no legal order can claim perfection. The fundamental rights accompany individuals, notwithstanding the jurisdiction which they enter. Even in the most backward and totalitarian country, a person is a holder of these rights. Ignoring these rights by a legal order does not mean that they can be denied. If the same person happens to be in a democratic country for a short period of time, that person will freely enjoy the fundamental rights, not because the legal order of that country grants him/her these rights, but because the person had such rights since the very moment of his/her birth. Thus, we should distinguish between the form of fundamental rights and the state of their implementation (guaranty). Fundamental rights are characteristic of human beings who are subjects of law. The Constitutional Court of Georgia has expressed the idea as follows: "state cannot grant or deprive a person of the basic rights, as it is not authorised to change the essence of a person."[1] This means that the essence of a right is defined with the essence of a person. In other words, **rights are derived from the essence of a human being, thus a human being embodies rights.** According to the interpretation of the Court, "Article 7

[1] Decision #1/466 of the Constitutional Court of Georgia, dated as of June 28, 2010.

of the Constitution[2] establishes two obligations of the State: 1) to acknowledge and 2) to protect the human rights. Due to the essence of the rights, their acknowledgement by the State means the obligation to recognise such rights as omnipresent entitlements of any individual. Whereas, protection of the stated rights means guaranteeing all the necessary mechanisms in order to ensure full exercise of such rights, including acknowledgement of the possibility to protect those rights at the court."[3]

This position of the Court does not mean that the source of the rights exists outside an individual. Any legal order is obliged to acknowledge that human beings, as subjects of law, are entitled to fundamental rights – the entitlements that are not separable from personality. Otherwise, the very humanity of a human being and his/her status as a subject of law become questionable. Individuals are subjects of law by birth. A human being has dignity and thus fundamental rights are related to dignity. Here we have such a chain of human characteristics that cannot be denied. Fundamental rights are recognized per se as human rights existing within human beings. What already exists, it can be only protected by legal order. Therefore, when we refer to acknowledgement of human rights by the State, we mean binding of the State with the existing reality. The purpose of reflecting on positive law is to develop the order of values for their effective protection. The Court's following judgment alludes to the same idea, expressed while interpreting Article 7 of the Constitution: "... non-performance or improper performance of the obligation to acknowledge and ensure the right may not question the existence of the right, as of the superior good of an individual. Acknowledgment of such obligation in the Constitution means that the State shall establish all the conditions for existence of such rights, otherwise, the fundamental rights of individuals will be violated, whereas all democratic and rule-of law states agree on the necessity of protection and guaranteeing of these rights and counter-activities would challenge the aspiration of the country towards the ideal of a state based on rule of law."[4]

Thus, no one can question the rights of an individual. A human being is an individual because he/she is a rational, and social creature with a personality. No one can deprive a human being of these characteristics. Article 7 of the Constitution sets forth the scope of the State's constitutional obligation in relation to human rights. This means that "... the State, in the process of governing, is restricted with human rights, whereas subjects of rights are individuals, irrespective of their citizenship, place of residence or factual location."[5]

This judgment of the Court makes us think that human rights are entitlements over and above the constitution. Constitutions are based upon human rights and not vice versa. A

[2] The State acknowledges and protects the generally acknowledged rights and liberties of an individual as the indispensable and superior human values. During the implementation by the government, people and the State are bound with these rights and liberties as well as with the directly applicable law.

[3] Decision #1/466 of the Constitutional Court of Georgia, dated as of June 28, 2010.

[4] Decision #1/466 of the Constitutional Court of Georgia, dated as of June 28, 2010.

[5] Decision #1/466 of the Constitutional Court of Georgia, dated as of June 28, 2010.

constitution alienated from human rights may not be considered as a guide to define the scope of such rights. This idea was explicitly stated in a decision of the Constitutional Court: "... human rights, with all their contents and scope are directly applicable, and, first of all, restrain the State not only from setting forth inappropriate limits to a particular right with a particular normative act, but also prohibit overcoming the essence of fundamental rights through the constitution itself by establishing the normative basis for their violation and/or abolition."[6] Therefore, even the constitution is powerless to distort the essence of fundamental rights as it cannot establish the essence either.

Imagine that the constitution attempts to distort the essence of fundamental rights. This is actually impossible, but theoretically the constitution might contain such a provision. How shall the Constitutional Court act in this situation? It is not authorised to review whether the constitution itself is "constitutional". Here, we can analogically use the formula of Gustav Radbruch. According to Radbruch, when law is not only unfair, but by its nature cannot even be qualified as legal, one shall act according to the law which is superior to statutory law.[7] Distortion of the essence of human rights is an action directed against the human being itself. Shall we always rely on the constitution in such a situation? In such an event, we shall construe the constitution in the light of the essence of human rights, which it contains due to their universal character. Universal scope of a right necessarily supersedes the narrowed scope set forth in the constitution. One shall not forget that the constitution cannot supersede the content of fundamental rights, as it does not define their essence. In such a case, the court will by all means find the legal basis for review of the normative act.

Constitutional Court in its jurisprudence, on one hand, acknowledges that human rights are inseparable from a human being, and that those are the rights defining the essence inherent to him/her; on the other hand, the Court develops an idea that Article 42 of the constitution defines human rights, and in particular, the right to access to the court. Legally human rights may not be defined by the Constitution. The constitution merely reflects such rights. The Constitution expounds the guaranty for these rights. Simply put, the court defines a right and defines its guaranties. Therefore, we find the reasoning stipulated in the court decision doubtful, which states that, "the issue of existence of particular rights, naturally, shall be decided on the basis of the provisions determining the fundamental rights."[8] Article 42 is not the provision that creates fundamental human rights, but it is a provision that sets forth the guaranty for those rights. The expression, "every man has the right to apply to the court" shall not be understood as if the constitution has established this rule. The constitution has merely reflected the right, which belongs to an individual based on the rule which is superior to the constitution.

[6] Decision #1/466 of the Constitutional Court of Georgia, dated as of June 28, 2010.

[7] Густав Радбрух, Философия права, М., 2004, p. 234.

[8] Decision #1/466 of the Constitutional Court of Georgia, dated as of June 28, 2010.

II. PRINCIPLE OF PRESERVING ESSENCE IN GERMAN LAW

In German Federal Constitution, the principle of preserving essence is stated as a general rule in paragraph 2 of Article 19. It defines that, "in no case is it allowed to violate the essence of a fundamental right". This principle represents the guarantied safety for the content of fundamental rights.[9]

The necessity to preserve the essence of human rights results from the fact that human rights have a universal character. They do not exist separately from other rights. Any right exists in a realm that is replete with social and private interests, and its content depends on the type of influence these interests have on it.[10]

In order to explain the principle of preservation of the essence of human rights, it is necessary to define what is implied by its content and to which rights it is applicable.

The question arises whether the essence preserving principle represents an independent principle, or it is implied in any other principle. One may not explicitly say that it is fully separated, for example, from the principle of proportionality. One of the requirements of proportionality is preservation of the essence of a right.[11]

While studying the above issue, it has to be taken into account that the Georgian Constitution does not contain general rules on restriction of fundamental rights. The separate rules of constitution deal with the necessity of limiting various rights. German Federal Constitution develops the general rule on restricting fundamental rights, as well as the general principle aimed to preserve the essence of them.

The principle of preserving the essence of fundamental rights addresses all the three branches of government i.e. legislative, executive and judicial, each one with the ability to affect human rights positively and negatively.

The principle of preserving the essence of fundamental rights provides the measure of constitutional changes. This principle obliges the legislature, in the event of any amendments to the Constitution, to protect the essence of fundamental rights in order to maintain and not to deteriorate the minimal standard of human rights. Preservation of essence and preservation of human rights shall be understood as synonymous phenomena with the same content.

In this context, the universal standards of human rights shall be taken into account, which restrict the authorities of member states of the European Union. When we refer

[9] Claudia Drews, Die Wessensaehaltsgarantie des Art. 19 II GG, 2005, S. 16.

[10] Claudia Drews, 16.

[11] Claudia Drews, 20.

to the essence of rights, we mean the universally accepted essence of such rights. German Federal Constitution does not state anything regarding the universality of the essence, but it is presumed that the essence of rights, which is acknowledged and accepted among the member states of the European Union, is implied. The implicitness of preserving the essence of human rights is well expressed in the decisions made by the Federal Constitutional. This is how one shall understand the nature of the essence of fundamental rights in the event of its definition by the Constitution of Georgia.

Federal constitution in general speaks about preserving the essence of fundamental rights. Therefore, it can be concluded that this principle deals with all fundamental rights. In accordance with the German Doctrine, such conclusion is quite disputable

According to a widely spread opinion, principle of preserving the essence applies to those rights, restriction of which is allowed on the basis of law. The essence is protected from constitutionally unacceptable interference with a right. German Federal Constitutional Court considers the principle preserving the essence in the context of restriction of rights. In particular, while defining paragraph 2 of Article 19, it relies on the content of paragraph 1 of the same Article. Towards those rights, to which paragraph 1 of Article 19 does not apply, paragraph 2 of the same Article is not applied either. As an example, the Federal Constitutional Court refers to paragraph 1 of Article 12 of the Constitution, which deals with regulations of rights rather than restrictions.

Judicial practice in Germany as well as the widely spread scientific doctrine consider that the principle of preserving the essence covers all fundamental rights.[12] It is also applied to the rights similar to fundamental rights.[13]

One shall review the principle of preserving the essence of rights both in its positive and negative aspects. One shall not consider preserving the essence only as the fact that an individual is entitled to protect himself/herself from the state, and to remind the state, by way of the constitution, that it may not restrict a right in a manner jeopardises the essence of that right. Notwithstanding the fact that the right to protect oneself from the state represents a necessary condition for guarantying fundamental rights, this is not a sufficient explanation of the principle. First of all, it is necessary that the object to be protected be itself capable of being protected and able to exist. The rights determined by the constitution together with their essence and content shall be qualified as fundamental rights of universal character. In short, the constitution shall define a right in such a manner that the essence of a right is well defined and worthy of being protected. The type and degree of protection to a right shall depend onto the character of legal order existing in a country, as any right indirectly represents the value premised on the existence of a particular legal order and depending on its scope. The legal order is not just one part

[12] Claudia Drews, 48.

[13] Claudia Drews, 53.

of the legal realm; the legal order is the whole legal realm, the entire body of it. In order to create a healthyorganism, the state is required to carry out its positive obligations in a manner the universal character of human rights requires. The legal order shall represent the order appropriate to the value of fundamental rights. Only in such an environment, rights may viably exist.

German scholarship offers absolute and relative theories regarding the content of the essence preserving principle. According to the absolute theory, the essence is the characteristic of a right, without which the existence of that fundamental right is impossible. The essence is the root of a right, its substance, the core, the indispensable framework, and the last bastion for its protection.[14]

The essence preserving principle and the principle of proportionality are not the same. The peculiarity of the principle of preserving the essence lays in the fact that the essence is not the subject of weighing, whereas the values considered under the concept of proportionality are weighable.[15]

The above mentioned does not mean that the essence of fundamental rights is frozen in time and not subject to changes. The content of a right is changeable in time. But, when we discuss protection of essence, we consider the essence of a right, which that right contains at that particular time and place. Any legal phenomenon may be considered from this point of view. The mentioned approach is known as the absolute-dynamic.[16]

Theory of relativity gives a different account of the essence preserving principle. According to this theory, preservation of the substance is not an absolute limit of a fundamental right. Essence of a right shall be defined in every particular case in relation to other interests being in collision with the essence. According to the more rigid theory there is no such a thing as the essence of a fundamental right. Its content may be revealed only in its relation with other interests. The essence of a right is revealed not as a material substance but as a relationship between parties in a particular situation.[17]

We consider that one may not have a strictly one-side approach to the principle of preserving the essence, as it is shown from the subjective theory. The essence of a fundamental right shall be considered as the value of having substantially peculiar features, revealing themselves in every particular case. By way of such an existential approach, the in-depth cognition of the essence of a right is possible. However, if we only consider the theory of relativity, it will become clear that legal certainty will be jeopardised, and the behavioral rules will become questionable. The essence of any event shall merely be what may be expected in every particular case. These cases will be the confirmation of what was prelimi-

[14] Claudia Drews, 61-63.

[15] Claudia Drews, 65.

[16] Claudia Drews, 65.

[17] Claudia Drews, 69.

narily given as the essence, but if we do not recognise and consider the absolute nature of essence as a scope for our understanding of rights, then the essence of fundamental rights will merely be what takes place in practice. However, we cannot formulate rules as every particular case differs with the rest. Though, practical existence of a right is crucial for the development of the notion of its essence.

In the practice of German Federal Constitutional Court, preserving the essence is related to the personality, and, in particular, to the dignity of of a human being. In this context, preservation of the essence represents the guaranty to the free development of an individual. We consider this view as well-founded. When one refers to an individual, the idea of a human being endowed with rights as a result of his/her humanity is implied. A human being gains personality due to these rights. What would happen if the essence of the above rights is jeopardised? In such a case, the personality of the human and his/her dignity will be questioned. That is why preserving the essence in case-law is related to dignity. Without the substantial guaranties of the fundamental rights, a human being would be deprived of the possibility to arrange his/her life according to his/her will, becomes the object of external influence, and the essence of a human being as the subject of law would also be questioned. To sum up, preservation of the essence serves the objective of guarantee an individual his/her dignity and personality as a human being.

Essence preservation is not the only constitutional problem that affects fundamental rights. Property rights have also to be subjected to the requirement of preserving the essence. The participant of either public or private legal relations does not have the right to restrict his/her own rights in contractual relationships in a manner that jeopardizes the essence of these rights. Should a participant of a civil transaction restrict his/her own rights, it not only violates the interests of that particular individual, but also questions the private legal values along with the rights of the other participants, and results in inadequate and unfair relations. Such a situation also places an additional burden on the State to resolve the disputes that may emanate from such scenarios. All these indicate to the fact that from the perspective of essence, a right is capable of protecting itself not because it is related to the personality of any particular human being, but because it objectively represents the entitlement and the protection that the subjects of law do not change its content. Any right is a human right in general rather than a right of a particular human being.

May the expropriation of property be considered as the exception to the essence preserving principle? In case of expropriation of the property, the right to such property is deprived rather than the essence of the right is infringed. Something that no more exists can have no essence. Peculiarity of preserving the essence is that violation of a right results in damage to the substance of a right. Even though a right has lost its form appearance, it still exists deprived of content and diminished, and yet can be subjected to legal review. Therefore, it still has the rudimentary traits. However, as these characteristics lack legal capacity, it cannot claim to be called a right. Therefore, violation of the essence of a right does not leave the space to make it eligible for legal review, and that right is said to have

lost its essence. Remains of rights after the violation of the essence are legally meaningless, and have no practical value. It is true, that violating the essence might be considered as the phenomenon equal to expropriated property, but due to the above mentioned circumstances, it shall not be fully identical thereto. Violation of the essence takes place when a right is subjected to restrictions that distort its appearance. The appearance of a right is the aggregate of characteristics establishing "ego" of that right.

III. ESSENCE PRESERVING PRINCIPLE IN ACCORDANCE WITH THE CONSTITUTION OF GEORGIA

In Georgian Constitution, we have no general rules on restricting fundamental rights based on essence preserving principle. After the introduction of the amendments adopted in 2010, the Constitution has underlined the aforementioned principle in Article 21. In general, when Constitution provides for restricting the fundamental rights, we can see the reflection of this principle in different forms. Most frequently, the Constitution provides for the guaranty for protection of fundamental rights, and at the same time defines the framework of its restriction in the context of particular societal interests. For example, Article 22 of the Constitution affirms the right of all the citizens, staying legally in Georgia, to freely move and choose the place of residence within the whole territory of the country. At the same time, the Constitution sets forth the basis for its restrictions, such as national security, social safety, etc. The provisions pertaining to this subject in the Constitution, exhaustively list all those social interests which may justify restriction of the fundamental rights. Therefore, it might be presumed that the limit of restriction of the right to pursue relevant interest is set so as to preserve its essence. The Constitution does not explicitly reflect the above stated; it is, however, elicited out of the nature of the limitation placed on a right. There are rules in the Constitution, which do not specify the basis for the restriction of a right, and are generally defined by referring to the social interests. In the event where the social interests need to be specified, the door of the Constitution is open for a legislator. For any legitimate interest, the essence of a right is the border that it may not overcome. On another occasion, the Constitution pays attention to the guaranties of a right without making a reference to the restrictions. This does not mean that the restriction of a right is not allowed. For example, Article 16 of the Constitution merely states that everyone is entitled to freely develop his/her personality. If we assume that the stated also applies to contractual freedom, then it will certainly be subject to restrictions.

Georgian Constitution has for the first time incorporated the form of the restriction of a right in which the essence preserving formulation is reflected. The aforementioned is

incorporated in paragraph 2 of Article 21 of the Constitution. For the sake of comparison, the old wording of this paragraph stated: "Restriction of rights defined in the paragraph 1 is allowed to protect social interests in the events and in the manner specified by law." The new content of this paragraph is as follows: "To protect social interests, it is allowed to restrict the rights defined in paragraph 1 in the events established by the law, and in accordance with the mandated rules, so that the essence of the property is not violated." As one may observe, difference between the two wordings is merely that in the current provision, the framework of the restriction of the property rights is indicated directly, and is reflected in the requirement of preserving the essence. As the amended constitutional text deals with the provisions protecting the property right only, logically the following question arises: does preservation of the essence deal with other fundamental rights? The answer is obvious: Essence preservation is the measurement of all fundamental rights. Then why did the legislator underline the above statement in such an extraordinary manner in relation to property right only? It seems, this is the result of the fact that property right is the most substantially restricted right. In comparison with other rights, property right may be the object of frequent restrictions in the name of social interests. Often, legal relationships between individuals are that of relations between property owners, and hence disputes occurring between individuals often involve the right to property (a classic example of this is the neighborhood law). The question arises, what would have happened if the said amendments were not made to Article 21? The answer is that the principle of restriction of the right to property would not have changed its character, such as preserving the essence of the right. The Constitutional Court has not underlined the importance of the protection of this principle in the process of restriction, and we shall refer to it later on. Preserving the essence of a fundamental right is derived from the nature of that right itself, and it is an elementary requirement towards the restriction of a right, which itself is a significant legal principle even without explicit statements made in the Constitution. Restriction of a right always implies the preservation of that right rather than its destruction. Though, it would be preferable if the legislature incorporates a general rule into the Constitution, in a manner it is effected in paragraph 2 of Article 19 of the German Federal Constitution. The essence of a right is revealed in the demand to preserve its content. Fundamental rights are tightly interconnected, thus violation of the essence of one right will negatively affect other rights. Human dignity is based on the body of substantially guarantied rights. Nonetheless, we consider highlighting the essence preserving principle in Article 21 as a step forward.

IV. ESSENCE PRESERVING PRINCIPLE IN THE PRACTICE OF THE CONSTITUTIONAL COURT OF GEORGIA

In judicial practice, the essence preserving principle is widely expressed in the process of restricting the right to property. The court has not once stated that the right to property has to be restricted in a way that its essence shall not be deteriorated, and the content shall be preserved. According to a widely spread held judicial practice, property shall remain the property. This practice has been introduced by the Constitutional Court of Georgia by way of the influence of a European precedent. In decision #-1/1/103,117,137,147-48,152-53, dated as of June 7, 2001, the Constitutional Court stated: "In case of any kind of legal or contractual restriction of the right to property, the essence of the right to property shall be preserved, and its inner content shall not be deteriorated."[18] Under this approach of the court, the most important aspect is that the preservation of the essence represents a general requirement that it is not addressed solely at the legislature, but towards all participants in the market. What is not allowed to the legislature shall not be allowed to any other party. The indicated provision shows that the essence is expressed in the content of the right to property. Similar approaches have been stipulated in other decisions. In accordance with decision #-1/2/411, dated December 19, 2008, the issue of preserving the essence of the right to property has been raised in relation to its functional capability. It was noted in the decision that: "the fact that as the result of the restriction, formally, the elements peculiar to the content remain with the proprietor does not mean that interference into the property rights is justified. Preservation of the essence of the right depends on the scope of restrictions on the contents of such right, as exactly such content is the factor defining the essence. In any case of restriction of the content of the property, the property shall remain as it is and shall be capable of carrying the burden incurred as the result of such restriction."[19] The court considered the restriction on the exercise of the right to property according to its intended purpose as a breach of the essence preserving principle "Ownership of of property will lose its sense if the property rights of the party are deprived of their content. The content of the right to property is guaranteed merely in the event of the property owner being able to execute in full the rights attached to a property, according to his/her will, and based on the nature of that property. Therefore, the legislature is obliged to allow a property holder to utilise the owned property according to the intended purpose, which implies establishing personal relations by the proprietor with the object of the property. This exactly is the expression of the positive content of the property as of the property right."[20] As one might notice, the guaranty of essence is violated, when proprietor property owner is deprived of his/her due right to utilize his/her property functionally. The

[18] Decisions by the Constitutional Court of Georgia, 2000-2001, Tbilisi, 2003, pg. 124.

[19] Decisions by the Constitutional Court of Georgia, 2008, Batumi, 2009, pg.112.

[20] Decisions by the Constitutional Court of Georgia, 2008, Batumi, 2009, pg.113.

most important issue is that utilization of a property according to its intended purpose by its owner is related to the preservation of the essence. In such an event, the court considers the scenario when a property holder is legally capable to carry out the realisation of the functions related to that property on his/her own. When the above is not possible, the issue will never arise from the stated point of view.

In decision #-1/3/393,397, dated December 15, 2006, dealing with the protection of constitutional rights based on the practice of the European Court, the Constitutional Court stated: "The restrictions shall not diminish the availability of rights allowed to a person to the point when the essence of those rights itself is violated."[21] In accordance with the decisions of the Court, while restricting a right, the scope of such restrictions shall be defined so that the substance of the right is preserved to the required level. This is possible when the right is not overloaded.[22] Justified demands placed on the exercise of a right do not render its implementation difficult and does not harm its existence. One of the examples of the aforementioned is a property right such as servitude. This right is exists to the extent it is not jeopardised. The existing formal order is arranged in the same way. In the doctrine the following statement is used quite often: servitude shall not turn the property vo*id.* Therefore, when any right is burdened with other right this shall be weighed in the manner that the burdened right be capable to bear it. Thus, restriction of a right, in its classic sense, means preserving the restricted object in a way that it might preserve its own appearance. Hence, it can be said that preserving the essence of a right means preserving its form. While reviewing the issue from the point of private law, it shall not be difficult to notice that in the interrelation of right to property and contractual rights such a problem arises quite often. For example, preserving the essence of the right to property depends on the scope of the definition of the rights and obligations. No matter to what extent the content of contractual rights is broadened, before it turns into the property right, it might not cause the termination of the essence of the property right. The fact is that the rights of the lessee and the lessor both have a wide scope according to the present Civil Code. But, this might not be considered as a danger to the essence of the right to property. The fact that the lessee and the lessor have the right to prolong the agreement derives from the social function of the right to property, which represents the characteristic of the right, but not the essential characteristic of the contractual rights.

Obviously, the legislature is in all cases obliged to define the scope of a right in a way that it fits into the essence (content) of such right. Thus, a right may not bear the essence of another right.

[21] Decisions by the Constitutional Court of Georgia, 2006-2007, Batumi, 2009, pg. 92.

[22] Karl Albrecht Schachtschneider, Prinzipien des Rechts States, Duncker & Humbolt, Berlin, 2006, S. 285-286.