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CONSTITUTIONALITY OF DIFFERENTIAL APPROACH IN ELECTORAL DISPUTES — SCRUTINY TESTS

PRACTICE OF THE CONSTITUTIONAL COURT OF GEORGIA

INTRODUCTION

The Constitutional Court of Georgia (hereafter the Constitutional Court) attaches great importance to the protection of rights. Accordingly, in order to assess an interference with the rights, the Court uses tests of strict scrutiny and rational differentiation that are established by it.

The Court is guided by assessment tests on constitutionality of differentiation during the discussion about a violation of rights in the electoral sphere. However, in the course of solving electoral disputes, an assessment standard of constitutionality of differentiation used by it, is not the same. In one case the Court applies the strict scrutiny test, while in other cases, the test of rational differentiation.

For illustrating miscellaneous practice of an assessment of constitutionality of differentiation in electoral disputes, in the first chapter of this paper, assessment tests on interference with rights, widely-established in Georgia and abroad, will be analyzed. The second chapter will be focused on the Georgian Constitutional Court's decisions, regarding an application of assessment tests on constitutionality of differentiation in electoral sphere and in conclusion, the results of analysis will be summarized.

1. ASSESSMENT TESTS ON CONSTITUTIONALITY OF AN INTERFERENCE WITH THE RIGHTS

There are different standards of assessment tests on constitutionality of an interference with the rights in Europe and the US. There are proportionality¹ tests on assessing the constitutionality of an interference with the rights in Europe, whereas, categorization tests are used in the US. The Case-Law of the Constitutional Court of Georgia, in this regard is similar to European and American ones, however, it has some characteristics, which will be discussed in more detail below.

1.1 European proportionality

Judges of a Constitutional Law have developed a doctrine of proportionality to resolve intra-constitutional conflict associated with rights. According to this doctrine, the law, if it does not meet the test of proportionality, shall be abolished.²

The European test of proportionality consists of four elements: suitable purpose, rational connection, necessary means³ and determination of the relevant correlation⁴ between the benefits, gained from a realization of a suitable purpose and the costs inflicted on constitutional rights.⁵

Suitable purpose is the element of proportionality, which defines to what extent the law on limitation of constitutional rights represents the purpose that will justify these limitations. This level of proportionality is known as “marginal assessment”. It is followed by an establishment of a rational connection level, at which an appropriateness of employed means to the purpose has to be determined. The next step is a necessity, also known as application of the least restrictive means.⁶ The final step is the

¹ The Standard of proportionality is typical for Europe and it originates from Germany; see Cohen-Eliya M. and Porat I., *The Hidden Foreign Law Debate in Heller: The proportionality Approach in American Constitutional Law*, *San Diego Law Review*, Volume 46, 2009, p. 388.

² In Canada, judges apply the LRM test when they are asked to enforce the “reasonable limits” prescription of Article 1 of the Constitution Act. In South Africa, LRM testing is required by the Bill of Rights itself, but the founders based this provision on a prior ruling of the Constitutional Court to adopt proportionality as an overarching principle of rights adjudication. Across post-1989 Central Europe, PA is automatically activated whenever the “necessity,” or “essential” nature, or “reasonableness,” of governmental measures is challenged under the rights provision; Stone S.A., Mathews J., *Proportionality Balancing and Global Constitutionalism*, *Columbia Journal of Transnational Law*, 47, 2008-2009, 91.

³ All three principles express the idea of optimisation... principles are norms requiring that something be realized to the greatest extent possible, given the legal and factual possibilities; Alexy R., *Constitutional Rights Balancing, and Rationality*, *Ratio Juris*. Vol. 16, 2 June 2003, p. 135.

⁴ An implication of balancing of public and private interests and proportionality in the narrow sense.

⁵ Barak A., *Proportionality: Constitutional Rights and their Limitations*, Cambridge: Cambridge University Press, 2012, p. 131.

⁶ *ibid*, p. 317.

balancing or proportionality in the narrow sense, where the direct conflict arises between a suitable purpose and a right. A judge must decide which one he/she will give a priority – to a constitutional right or public welfare.⁷

The European Court of Human Rights interprets a proportionality test in this way: the first question for the Court is the existence of a legitimate aim. This prong is relatively easy to satisfy in cases, where the constitutional provision does not specifically restrict the kind of aims that count as legitimate for justifying an interference with a specific right... The next question is empirical and designates the suitability of applied means for the purpose. A means is suitable, if it actually furthers the declared policy goal of the government... The next level includes determination of necessity, according to which, a measure is necessary only if there is no less restrictive but equally effective measure available to achieve the intended policy goal. This test incorporates, but goes beyond the requirement, known to the US constitutional lawyers that a measure has to be narrowly tailored towards achieving the respective policy goals. Unlike the American test, the necessity test allows the consideration of alternative means, rather than just insisting on tightening up and limiting the chosen means to address the problem... At the last stage of proportionality, the Court assesses whether the measure was proportional in the narrow sense, applying the so-called “balancing test”.⁸

During the revision of a case, the Strasbourg organs pay the utmost attention to the third stage of the proportionality test – “necessary in a democratic society”. The Convention bodies have developed two criteria for applying this standard: the reasons adduced by a respondent state for justifying an interference, must be both “relevant and sufficient”, and the “necessity” must imply the existence of a “pressing social need”.⁹

Thus, in Europe the courts evaluate the constitutionality of an interference with the right through the proportionality test. In this regard, the United States Supreme Court’s approach is different, which is discussed in the next subchapter.

1.2. American Categorization

Unlike the European proportionality, under American categorization, the protection of rights, depend on the form of scrutiny and not on each level of a specific test. Consequently, categorization sets various forms of scrutiny for different categories of rights. According to the categorization, the

⁷ *ibid*, p. 342.

⁸ Kumm, M., Institutionalizing Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review, *European Journal of Legal Studies*, Vol. 1, No 2, 2007, pp. 9-11.

⁹ Takahasi Y.A., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, Antwerp-Oxford-New York, 2001, p. 11.

lowest form of scrutiny is minimal scrutiny. At this level of scrutiny, it is sufficient that the purpose has to be legitimate state interest and the applied means for achieving that legitimate state interest must have a “rational basis”. This kind of scrutiny does not provide for another review after establishing the level of suitability, while in the case of proportionality, determination of suitability is followed by an application of necessity and balancing tests.¹⁰

When an intermediate scrutiny is used, the aim of a legislator is an important state interest, which is higher than a suitable purpose, established by the test of proportionality. In addition to this, the applied means in this case must be substantially related to an achievement of a goal. However, the standard of protection of rights is lower than the necessity requirement, envisaged by the test of proportionality. At minimal and intermediate scrutiny tests, proportionality in its narrow sense is not used at all.¹¹

The most important standard is strict scrutiny, where a legislator’s goal has to be a compelling state interest and the means of achieving that goal must be narrowly tailored. The margin of a compelling state interest is apparently higher than a proper purpose used in proportionality test. However, the means used to achieve the goal set by the US legislators, is the same as it is given under necessity element of the test of proportionality.¹²

The above discussion shows that categorization is an alternative to a test of proportionality, which separates different rights from one another and forms independent category of them. Unlike proportionality, categorization operates through “categorical characteristics” to determine what kind of constitutional scrutiny can be used. In addition, during categorization, the balancing of public and private interests¹³, which works at the test of proportionality, is not applicable in this case¹⁴.

¹⁰ Baker A., Proportional, Not Strict, Scrutiny: Against a U.S. “Suspect classifications” Model under Article 14 ECHR in the U.K., *American Journal of Comparative Law*, Volume 56, No 4, Fall 2008, pp. 878-879.

¹¹ Barak A., *Proportionality: Constitutional Rights and their Limitations*, Cambridge: Cambridge University Press, 2012, pp. 515-516. However, as Baker points out, an intermediate, as well as, a minimum scrutiny include balancing elements, as the courts have to assess what is meant by “essential”, “important” and “compelling state interest”; Baker A., Proportional, Not Strict, Scrutiny: Against a U.S. “Suspect classifications” Model under Article 14 ECHR in the U.K., *American Journal of Comparative Law*, Volume 56, No 4, Fall 2008, pp. 878-879.

¹² Barak A., *Proportionality: Constitutional Rights and their Limitations*, Cambridge: Cambridge University Press, 2012, pp. 516-517.

¹³ Generally, balancing approaches set the individual’s interest in asserting a right against the government’s interest in regulating it, attach whatever weights are appropriate for the context, and determine which is weightier. Blocher J., *Categoricism and Balancing in First and Second Amendment Analysis*, *New York University Law Review*, May 2009, p. 381. It is noteworthy, that the concept of balancing is the central concept in the adjudication of the Federal Constitutional Court, which has developed further the line first set out in the Lüth decision. Alexy R., *Constitutional Rights Balancing, and Rationality, Ratio Juris*. Vol. 16, 2 June 2003, p. 134. The Lüth’s decision reinforces three ideas, which have played a fundamental role in development of the German Constitutional Law. According to the decision, the first important idea is that constitutional rights are not shaped only by rules, but also by standards. The second idea, which is related to the first one, implies that the principles and values of the constitutional rights extend not only to the relations between citizens and a state, but to all domains of law. They have a “radiation effect” upon the whole legal system. Constitutional rights are pervasive. The third idea is derived from the structure of values and principles. The values and principles contradict each other. Contradiction may be solved by balancing. The Lüth’s decision confirms that “A balancing of interests becomes necessary”. Barak A., *Proportionality: Constitutional Rights and their Limitations*, Cambridge: Cambridge University Press, 2012, p. 509.

¹⁴ *Ibid.*, pp. 505-507.

Thus, the main difference between proportionality and categorization is that it does not apply the act of balancing, which is known as proportionality *stricto sensu*, which pursuant to proportionality test, is used in every case. Nevertheless, the rest of proportionality's components, such as – proper purpose and the lack of a less restrictive alternative, may be considered a part of categorization as well.¹⁵

Critics point out that the difference between the American and other systems is rather formal, because the Americans are resorting to the same doctrine, as the rest of the world.¹⁶ Balancing is a tool that every “intelligent person” uses in his daily life in order to make a reasoned decision¹⁷ and the Americans cannot be isolated from balancing.¹⁸ The idea that the two methods will get closer to each other, in the future, is real. This is particularly evident in the recent decisions of the Supreme Court,¹⁹ where judges are trying to bring balancing elements into the Constitutional Justice.²⁰

After discussing the widespread assessment tests on constitutionality of an interference with the rights in Europe and America, an established approach of the Constitutional Court of Georgia will be reviewed below.

1.3. Georgia's mixed type model

An assessment model of constitutionality of an interference with the rights, established in Georgia, fully includes the elements neither of the European proportionality, nor the American categorization. It can be portrayed in the form of a mixed model, in which the above-mentioned particular components of proportionality and categorization are combined. The features that characterize each of the standards of assessment of constitutionality of differentiation will be discussed in the following subchapter.

¹⁵ Ibid., p. 509.

¹⁶ Cohen-Eliya M. and Porat I., The Hidden Foreign Law Debate in Heller: The proportionality Approach in American Constitutional Law, *San Diego Law Review*, Volume 46, 2009, p. 370.

¹⁷ Aleinikoff A.T., *Constitutional Law in the Age of Balancing*, *Yale Law Journal*, April 1987, p. 972.

¹⁸ Mathews J., Stone S.A., All the Things in Proportion? *American Rights Review and the Problem of Balancing*, *Emory Law Journal*, Volume 60, 2011, p. 872.

¹⁹ Cohen-Eliya M. and Porat I., The Hidden Foreign Law Debate in Heller: The proportionality Approach in American Constitutional Law, *San Diego Law Review*, Volume 46, 2009, p. 380.

²⁰ Blocher J., *Categoricalism and Balancing in First and Second Amendment Analysis*, *New York University Law Review*, May 2009, p.412. Balancing elements are rooted in the American Constitutional Law and despite the fact that the American Courts do their best, they still cannot bypass an implementation of balancing. Mathews J., Stone S.A., All the Things in Proportion? *American Rights Review and the Problem of Balancing*, *Emory Law Journal*, Volume 60, 2011, p. 872. Putting proportionality in quotation marks, labeling it an approach, and replacing the majority's words are clear indicators of Breyer's conscious and intentional decision to incorporate the proportionality approach – the well-known European doctrine of proportionality – into his dissenting opinion. Cohen-Eliya M. and Porat I., The Hidden Foreign Law Debate in Heller: The proportionality Approach in American Constitutional Law, *San Diego Law Review*, Volume 46, 2009, p. 380.

1.3.1 Tests on strict scrutiny and rational differentiation

The Georgian Court uses tests on strict scrutiny and rational differentiation in reviewing the constitutionality. According to the Court's interpretation – "Assessments and their instruments of what is "natural", "reasonable" and "necessary..." are historically variable". However, in any case, the principle of equality gives freedom of choice to a legislator in making a decision on the restriction, until objective justification of differential treatment is available" (unofficial translation).²¹

From the standpoint of the Court, the scope of discretion varies in case of interfering with a right and depends on the sphere, in which a state exercises a differentiation. Therefore, the scale of evaluation of reasonableness of different approach is also different: In certain cases it may imply the necessity to substantiate an existence of legitimate public aims". For a court, the aims such as: state security, public order and a specific public interest to interfere in constitutional rights under a constitution, can be considered legitimate.²²

The Court takes the view that in some cases, when there is a need to prove the necessity of the existence of a legitimate aim, the standard of a test, is strict, whereas in other cases, when justification for rationality of restrictions, stands as a sufficient requirement, the standard of a strict scrutiny test on constitutionality of differentiation, turns into rational differentiation test.²³

Thus, in accordance with the Court's explanation, for an application of a strict scrutiny test, "to prove the legitimate aim, it is necessary to demonstrate that the state interference is absolutely necessary there is compelling state interest thereto".²⁴ Consequently, if a regulation contemplates satisfying the requirements of a strict test, the action taken by a state for achieving a legitimate goal has to be absolutely necessary and serve a "compelling state interest".

Unlike the strict scrutiny test, the Court resorts to the test of rational differentiation in case of identification of low intensity of breaching a right. In such cases, differentiation from a state's side must be based on "maximum reality, inevitability, or necessity which a norm needs to meet the test of rational differentiation."²⁵ At this point justification of differential treatment of rationality is considered to be

²¹ Judgment No. 1/1/493 of the Constitutional Court of Georgia of 27 December 2010 on the case "Political Associations of Citizens": "New Rights Party" and "the Conservative Party of Georgia" vs. the Parliament of Georgia", II.5.

²² Ibid. II.5.

²³ Ibid. II.5.

²⁴ Judgment No. 1/1/493 of the Constitutional Court of Georgia of 27 March 2011 on the case "Citizen of Georgia, Bichiko Chonkadze and others v. Minister of Energy of Georgia", II.6.

²⁵ The court clarifies that "the need or necessity of constraints must be tangible. Sometimes, Maximum actuality of differentiation, including, for example, differentiation caused by impossibility of factual obviation from particular circumstances, might be enough. In the latter case, we cannot talk about discrimination, if the unequal treatment is subject to a reasonable explanation, justification and rationalization". (unofficial translation) Judgment No. 1/1/493 of the Constitutional Court of Georgia of 27 December 2010, on the case "Political Associations of Citizens": "New Rights Party" and "the Conservative Party of Georgia" vs. the Parliament of Georgia", II.5.

sufficient, which implies confirmation of a real and rational connection between an objective reasons of differentiation and its outcomes”.²⁶

Proceeding from the above mentioned considerations of the Court, when in one case, it indicates the necessity of the verification of a legitimate aim which is strict, in the second case, it demonstrates adequate rational link between a means and purpose and application of the test of rational differentiation. It is obvious, that the Georgian Judiciary evaluates constitutionality of an interference with a right according to the standard of a strict and minimal scrutiny, established in the US. This statement is based on the fact that under strict scrutiny test in Georgia, which is similar to the American one, compelling state interest must represent the aim of a legislator and the means for achieving the goal have to be absolutely necessary. As regards the test of rational differentiation, accepted in Georgia, like the American minimal scrutiny test, according to Georgian test of rational differentiation, if the means for achieving a state interest have some rational basis, it is deemed to be sufficient. The difference between the US and Georgia is reflected in the fact that in application of a strict and minimal test in the US, a court does not additionally apply the principle of proportionality, as it sets forth the criteria of a strict and minimal test utilization in advance.

The point is that, the Georgian Court resorts to a strict scrutiny test, when a right, laid down in the Constitution is violated (in particular, when there is a differentiation in race, color of skin, language, sex, religion, political or other opinions, national, ethnic and social affiliation, origin, property or social status, place of residence)²⁷, or the violation can be characterized with high-intensity, and in this, it rather resembles the American categorization, as it predetermines the cases, when a strict scrutiny test must be used. However, in terms of classical principle, as well as in the case of an application strict scrutiny test due to the high-intensity of violation²⁸, the Georgian Judiciary, unlike the American one, in addition, is guided²⁹ by the principle of proportionality.³⁰ In such cases, when principle of

²⁶ Ibid. II.6.

²⁷ Article 14 of the Constitution of Georgia.

²⁸ In addition, the court defines how the assessment of differentiation intensity should be exercised and indicates that “Assessment criteria of differentiation intensity will vary in each case, depending on the nature of differentiation and sphere of regulation. However, in any case, the fact that how considerably the circumstances will differ for persons in substantially equal situation, that is how sharply a differentiation will separate persons in substantially equal situation from the opportunity of equal participation in a specific public communication, will play a decisive role”. (unofficial translation); Judgment No. 1/1/493 of the Constitutional Court of Georgia of 27 March 2011 “Citizen of Georgia on the case “Bichiko Chonkadze and others v. Minister of Energy of Georgia”, II.6.

²⁹ “Only the constitutionality of the means of attaining a legitimate aim can be reviewed with the principle of proportionality”. Judgment No. 1/2/411 of the Constitutional Court of Georgia of 19 December 2008 on the case “LTD “Russenergoservice”, LTD “Patara Kashi”, and JSC “Gorgota”, individual company “Farmer” of Givi Abalaki and LTD “Energia” v. the Parliament of Georgia and the Ministry of Energy of Georgia”, II.9.

³⁰ Thus, as in terms of classical signs, so due to the high intensity of violation, in application of a strict scrutiny test, the Georgian judiciary applies the European test of proportionality.

proportionality is applied in assessing the constitutionality of a norm, the court first determines what is a legitimate purpose of an appealed norm and how admissible, necessary and proportionate³¹ are those means used by a legislator to pursue a legitimate goal.³²

Additionally, it should be noted that unlike a strict scrutiny test, according to a test of rational differentiation, while assessing the constitutionality of a norm, the Georgian Judiciary does not talk about the principle of proportionality at all. It automatically connects the low intensity of violation with a possibility of using the test of rational differentiation³³, which confirms the complete similarity of the Georgian rational differentiation standard to the American minimal test.

Once the various tests on assessment of the constitutionality of interference with a right have been considered in general, an application of scrutiny standards by the court, during electoral disputes, will be discussed below.

³¹ When a strict scrutiny test is used, restrictions imposed by disputed norm, should pursue a legitimate aim and present proportionate means for achieving that goal. The principle of proportionality requires that “the restrictive regulation must be a reasonable and necessary means for achieving (legitimate) public aim. At the same time, the intensity of the restriction must be proportionate to the aim pursued. It is impermissible to pursue a legitimate aim at the expense of increased restriction of human rights”. Judgment No. 3/1/512 of the Constitutional Court of Georgia of 26 June 2012 on the case “Citizen of Denmark, Heike Cronqvist v. Parliament of Georgia”, ll.60. At the same time, “when the conditions of a legitimate goal don’t exist, any interference in human rights has an arbitrary nature and limitation of rights in its grounds is unjustified, unconstitutional”. Judgment No. 3/1/531 of the Constitutional Court of Georgia of 5 November 2013 on the case “Citizens of Israel - Tamaz Janashvili, Nana Janashvili and Irma Janashvili v. the Parliament of Georgia”, ll.15.

³² The court explains that “In order to achieve legitimate aims, laid down in the Constitution, a legislator has to choose proportionate means for interference with the rights. For this purpose, the regulation chosen by legislator must be admissible, necessary and proportionate” (unofficial translation). Judgment No. 1/1/539 of the Constitutional Court of Georgia of 11 April 2003 on the case “Citizen of Georgia Besik Adamia v. the Parliament of Georgia”, ll.27. However, the court’s practice discussed below shows that in the framework of a strict scrutiny test, the Georgian Judiciary does not fully use the principle of proportionality in all cases. Especially in terms of the fourth element of the principle of proportionality, related to an establishment of the balance between public and private interests.

³³ It will be more desirable, if the Georgian case law, in this regard, becomes more specific (as unequal approaches towards the tests of strict scrutiny and rational differentiation, an application of proportionality principle in one case and non-application in another case, will engender misunderstanding). Judgment No. 1/1/493 of the Constitutional Court of Georgia of 27 December 2010, on the case “Political Associations of Citizens”: “New Rights Party” and “the Conservative Party of Georgia” vs. the Parliament of Georgia”.

2. APPLICATION OF ASSESSMENT TESTS ON CONSTITUTIONALITY OF DIFFERENTIAL APPROACH IN ELECTORAL DISPUTE RESOLUTION

The Court, in its decisions, especially singles out an importance of elections³⁴ and underscores that it is necessary to ban unjustified differentiation during the elections. From the standpoint of the Court: “equality, in general, is part of the essence of the right to vote. In the election process, a state has an obligation to ensure an environment of equality. In this process, its main function is not to restrict or privilege anyone without reasonable argumentation”.³⁵

According to the Court, on the one hand, the citizens should have an equal opportunity to participate in the electoral process, so as to influence the outcome of the election. Furthermore, the Court states that apart from citizens, political parties should also be given a real opportunity for transition from minorities to majorities. “In other words, for minority’s self-realization, the legislation has to allow for equal guarantees for abilities of minorities alongside with majorities to ensure equal conditions for the competition between political forces, as well as their supporters, in the political process.”³⁶

The court does not rule out an introduction of differentiation by the state in the electoral sphere and invokes specific examples relating to the institution of electoral qualification, granting equal access of air time only to qualified entities and also designation of electoral threshold. Consequently, the Court considers, that differentiation in the electoral sphere, as well as in other areas, is admissible, however, the court takes the view that differentiation should not be unreasonable.³⁷

The more detailed discussion about how the court evaluates the constitutionality of differentiation in the electoral area, and which test it applies for this purpose, will be given below.

³⁴ Elections represent a sort of institutional mechanism, which sets in motion democracy. “Governance of People” can be formed if people participate in politics and for that purpose election process is the best way. The elections, themselves, create a feeling and belief in people that they are directly taking part in the process of a state’s governance (as they elect their favorites or they, themselves, are elected). It is of great importance how the elections are held. First of all, what does an electoral legislation look like? To what extent does it contain sufficient and necessary safeguards to ensure that, as a result of the election, a country and its citizens can obtain “Governance of People”. This effect is achievable, if participation in the election is actually equally available to all citizens. Judgment No. 1/1/493 of the Constitutional Court of Georgia of 27 December 2010, on the case “Political Associations of Citizens”: “New Rights Party” and “the Conservative Party of Georgia” vs. the Parliament of Georgia”;

³⁵ Ibid., II.6.

³⁶ Ibid., II.6 .

³⁷ Ibid., II.8.

2.1. The case of “New Rights Party”

In order to demonstrate, which test was applied by the Court, while ruling on the case “Political Associations of Citizens”: “New Rights Party” and “the Conservative Party of Georgia” vs. the Parliament of Georgia”, an attention will be paid to the part of a decision, where the discussion refers to the constitutionality of Article 76 (2) of the Organic Law of Georgia on the “the Election Code of Georgia”.

According to Article 76 (2) of the Organic Law of Georgia on the “the Election Code of Georgia”, public servants, who used government vehicles, were allowed to use them only on the condition of being reimbursed for fuel. In the view of plaintiffs, the impugned norm was making unjustified distinction from political (or party) motives, as the possibility of using specific administrative resources were solely imparted to representatives of those political forces, who due to their official positions, had access to these resources, whereas other parties, that had no representation in the public service in the positions, where personal cars were envisaged for official operations, were deprived of such opportunities.³⁸

While discussing the constitutionality of Article 76 (2) of the Election Code of Georgia, initially the Court determined, how the disputed norm, on political grounds, was causing differential treatment towards essentially equal persons. In the Court’s opinion, there was no political differentiation between essentially equal persons. The Court noted that the regulation envisaged by an imputed norm was relevant to the persons not by their party affiliation, but by their particular positions, which provided them with a right to possess personal government vehicles for performing their official duties. From the Court’s point of view, in this regard, these persons were in a privileged position, compared to those, who did not hold such posts. Hence, there was disparity in position and not on the grounds of political one.³⁹

After ruling out the differentiation with classical signs, the Court examined the degree of intensity of differentiation, in order to determine which assessment test on constitutionality of a norm (strict scrutiny test, test of rational differentiation) could be used. In defining the degree of intensity of differentiation, the court found that the differentiation was not on that level of intensity, which would essentially have separated electoral subjects from the actual equality of opportunities in the pre-election period.⁴⁰

³⁸ Ibid., II.20.

³⁹ Ibid., II.21.

⁴⁰ Ibid., II.23.

The Court had founded this provision on the fact that a vehicle was not characterized with “exclusive features”. Unlike airtime for electoral subjects, the use of a car did not affect greatly an effective realization of the right to vote.⁴¹

If, from the standpoint of the court, an equal distribution of airtime among the election subjects may have had a decisive impact on the results of elections, the same does not apply to the use of the vehicle owing to the fact that utilization of airtime is a simple and direct way of communicating with constituency. It enables voters to get familiar with the programs and promises of each electoral subject, to compare them with one another and make a desirable choice.⁴²

In addition, the Court considers that an extra basis for justification of a difference, established by a disputed norm, is the fact that public officials can be allowed to use government vehicles only in the cases, if they are willing to compensate fuel costs used for the election campaign.⁴³

Consequently, the Court concluded that there was less intensive interference with a right to equality instead of drastic one and for this reason it applied a test of rational differentiation in place of a strict scrutiny test.

Although the Court did not accentuated that it was using the proportionality principle, but in order to solve the dispute with rational differentiation test, the Court gave the preliminary assessment on proportionality of public and private interest⁴⁴ and only after that proceeded to the application of rational differentiation test. Hence, the Court had predetermined a foundation for an application of a rational differentiation test and low intensity of the violation.

In the course of rational differentiation test, the court first ascertained what a disputed norm was aiming at and noted that under Article 76 (2), civil servants, state officials, who enjoy personal government vehicles for the effective exercise of their official tasks, may find themselves faced with the need to perform official duties when they are engaged in pre-election campaigning after the execution of their official duties. If they cannot use the government vehicle in a timely manner, this could hinder the performance of a particular function, because the short period of time for its effec-

⁴¹ Ibid., II.23.

⁴² Ibid., II.23.

⁴³ Ibid., II.23.

⁴⁴ The Court held that a means used by a legislator for achieving the goal was suitable, as the difference between persons was based on their positions and not on political values. Moreover, the means they have employed were necessary, because from the standpoint of the Court, there was not a more restrictive alternative. The Court also stated that due to the reimbursement of the fuel costs by public servants, infliction of pecuniary losses on the state would be excluded. *ibid.*, II. 24.

tive implementation can play a crucial role. For that reason, the court concluded that the goal of an imputed norm is a real, practical necessity of a state, to avoid problems (impossibility of performing a particular official duty by a statesman), which are “sufficiently tangible” and that can be caused by the absence of such regulations.⁴⁵

In addition, according to the Court’s opinion, pursuant to the test of rational differentiation, utilization of a government car, as long as fuel costs are compensated, is considered to be a reasonable way for a state to achieving a goal.⁴⁶

Rational connection between the means and the purpose is proved by the fact that during the usage of a government vehicle, the state obliges a public servant to cover fuel costs while using administrative resources.⁴⁷ As for the other expenses, related to operation of a vehicle, (except for fuel), from the Court’s point of view, such funds will not potentially create a “substantial difference between electoral subjects”.⁴⁸

Consequently, as an appealed regulation met the test of rational differentiation, and the means used by the state for its legitimate aim was reasonably related to the purpose, the Court considered that the appealed regulation was constitutional.

The Court’s standard of an assessment of a norm’s constitutionality on the subsequent decision is different. In that case, the strict scrutiny test replaces the test of rational differentiation.

2.2 The case of 500 GEL deposit

While reviewing the constitutionality of an impugned provision on the case “Citizen of Georgia, Besik Adamia and others v. the Parliament of Georgia”, the Court assessed the wording of Article 116 (7) of the Election Code of Georgia, according to which, in order to register the candidate for a member of the Parliament of Georgia, representative of the initiative group of voters, shall submit a bank document certifying the 5000 GEL deposit on the account prescribed by the CEC. The Court reviewed whether it was unjustified differentiation towards persons willing to use passive voting right, parties running in the elections independently, election bloc, candidates presented by

⁴⁵ Ibid., II.24.

⁴⁶ Ibid., II.24.

⁴⁷ Ibid., II.24.

⁴⁸ Ibid., II.24.

a five-member group of voters and whether the disputed norm was breaching a constitutional requirement of equality.⁴⁹

Since the Court has determined that there were essentially equal persons, it deliberated about which tests should have been used to determine an existence of differential treatment towards essentially equal persons. The Court noted that there had been no differentiation on political and/or property grounds (as the applicants indicated).⁵⁰ At first the court stated that there was no political discrimination against essentially equal persons. The court came to this conclusion based on the following reasoning: nomination of a candidate by a political party or election bloc does not “necessarily and in itself” imply that the candidate belongs to the nominating political party or election bloc, or shares their political views, as well as, an inclination to run as an independent candidate does not “itself” mean that a person is apolitical or does not share the views of any political party and does not have sympathy towards it.⁵¹

The Court also did not uphold the complainant’s view that there was differentiation in terms of essentially equal individuals on property grounds. The Court concluded that the differentiation of individuals was associated with their presentations by different subjects and had nothing to do with the differentiation on their property grounds.⁵²

Although, from the Court’s point of view, differentiation between substantially equal persons is not based on any of the “classic features” that would create the basis for an application of strict scrutiny test on the constitutionality of the norm, it resorted to the “strict scrutiny test” to review the constitutionality of a disputed norm, as it found that: “disputed regulation substantially and essentially removes persons from equal starting conditions. Namely, in some cases, it completely rules out the possibility of individuals to participate in the majoritarian election system with a passive right to vote.”⁵³

Accordingly, from the standpoint of the Court, the bases for an application of a strict scrutiny test, in this case, was a high intensity violation of the right to equality and not a “classic sign”. Consequently, in the framework of the use of a strict scrutiny test, the Court first set a legitimate goal. The Court found that the disputed provision was aimed at: avoiding unreasonable expenditure of public funds as a result of removal of futureless candidates from election process, and ultimately, effective implementation of the right to vote.⁵⁴

⁴⁹ Judgment No. 1/1/539 of the Constitutional Court of Georgia of 11 April 2013 on the case “Citizen of Georgia, Besik Adamia and others v. the Parliament of Georgia”, II.8.

⁵⁰ Ibid., II.14.

⁵¹ Ibid., II.14.

⁵² Ibid., II.17.

⁵³ Ibid., II.21.

⁵⁴ Ibid., II.23, II.24.

After the designation of a legitimate aim, the Court examined the means of achieving the goal. The Court pointed out that the means for effective performance of achieving the goal, that is, the right to vote, as it deemed, was to lay candidate under obligation to submit documents certifying that the election deposit has been paid and/or the signatures of a certain number of voters.⁵⁵

At the same time, in addition to defining a legitimate aim and the means to its achievement, the Court noted that while regulating the issue of voting rights, the state enjoys a wide discretion.⁵⁶ However, even in this case, it must choose a proportionate way to achieve its goal and to ensure that a regulation meets the principle of proportionality, and it must be admissible, necessary and proportionate.⁵⁷

The Court considers that an obligation to pay a deposit for the election stands as a permissible means to achieve this goal, because “it represents the suitable, useful means, that is, gives an opportunity of achieving the aforementioned goal”.⁵⁸

Nevertheless, an obligation to pay a deposit for the election was not considered by the Court as a necessary means for achieving the goal. It indicated that the means would be considered necessary only in the case, if the state validated an inevitable necessity for a candidate of using an election deposit, nominated by the initiative group.⁵⁹ As the state had not provided such evidence, the Court did not agree on arguments as the only and necessary means for achieving the goal for the state, which was related to the fact that political parties, depending on their activities, in comparison with initiative groups, “are more solid and serious entities”.⁶⁰

In addition, the Court talked about the necessity of using the least restrictive means for a right and pointed out that “in the present case, the disputed norm cannot be regarded as the least restrictive means for a right due to the fact that election deposits for candidates nominated by a initiative group, are used with other means (submission of signatures of voters) for achieving the same purpose and it is considered to be a sufficient guarantee for achieving the goal, in the case of candidates, proposed by a party/bloc. As a result, a disputed provision imposes an unduly heavy burden upon only one group of candidates. The act of imposing an obligation to pay a deposit for the election only on independent candidates, through an excessive interference with their rights, is considered to be discriminatory against them.”⁶¹

⁵⁵ Ibid., II.29.

⁵⁶ Ibid., II.26.

⁵⁷ Ibid., II.27.

⁵⁸ Ibid., II.30.

⁵⁹ Ibid. II.31.

⁶⁰ Ibid., II.32, II.33, II.34.

⁶¹ Ibid., II.35.

Furthermore, the Court found that despite a wide limit of discretion in the election sphere, restrictions set by the state, was causing the transformation of a right to vote into a “privilege”. The Court concluded that the state should have defined a reasonable and proportionate amount of deposit and ensured to offer an alternative in the form of collecting signatures, which would have reduced the risk that the nomination of a candidate could depend on an individual’s financial condition.⁶²

Accordingly, the Court decided that since the disputed norm did not comply with a standard of a strict scrutiny test, in particular, it was not a necessary and the only means of achieving the goal, it was considered to be an unconstitutional provision. The above-mentioned analysis shows that the Court, proceeding from a special importance of the election, employed the strict scrutiny test for settling the dispute. It is important that the Court discussed the following statutory elements for surmounting strict scrutiny test: a legitimate state aim, admissibility of a means for achieving the goal, necessity (it talked about the least restrictive means). Nevertheless, it did not touch upon the question of balancing public and private interests in detail and found that an impossibility to substantiate the necessity of a means by the state was underlying the cause of an unconstitutionality of the norm.⁶³

It should be highlighted the recent decision of the Court, where it resorted to a strict scrutiny test on constitutionality of interference with the right to vote, however, did not make any special reference to it.

⁶² Ibid., II.36.

⁶³ It should be noted that the Court, in all cases, does not make individual assessment of all elements of the principle of proportionality, set by a strict scrutiny test. The Court did not discuss each element of the principle of proportionality individually. In the case “Citizens of Russia – Ogan Darbanian, Rudolph Darbanian, Susanna Zhamkotsiani and Armenian citizens Milena Barseghyan and Lena Barseghyan vs. the Parliament of Georgia” the Court held that although, there was a differentiation on the basis of the disputed provisions with classic signs of „place of residence “and „citizenship,” but, in addition, differentiation was characterized by high intensity. It required an application of the principle of proportionality and strict scrutiny test, but did not elaborate on the admissibility, necessity and proportionality of the means for achieving a legitimate aim. The Court just pointed out that the defendant had failed to prove the existence of “compelling state interest” that would justify the process of casting a claimant into differential condition. Judgment No. 2/3/540 of the Constitutional Court of Georgia of 12 September 2014, on the case “Citizens of Russia - Ogan Darbanian, Rudolph Darbanian, Susanna Zhamkotsiani and Armenian citizens Milena Barseghyan and Lena Barseghyan v. the Parliament of Georgia”. II.54-55. The Court did not also use the full form of a strict scrutiny test in the case “Citizen of Georgia, Ia Ujmajuridze vs. the Parliament of Georgia”. The Court stated that there was a high-intensity interference with the right, but did not discuss specific elements of the proportionality principle, to make an appropriate decision after their assessment. Owing to the fact that differentiation was restricting the right with more intensity than it was necessary for achieving a legitimate aim, the Court considered that it was a sufficient basis for declaring the norm unconstitutional. Judgment No. 2/5/556 of the Constitutional Court of Georgia of 13 November 2014, on the case “Citizen of Georgia, Ia Ujmajuridze vs. the Parliament of Georgia”, II.38. In the case “Citizens of Georgia – Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze vs. the Ministry of Labor, Health and Social Affairs” the Court, though, concluded that there was a high-intensity restriction with the right, it did not assess individual elements of the principle of proportionality and regarded the high degree of interference with the right as an underlying cause of an unconstitutionality of the norm. Judgment No. 2/1/536 of the Constitutional Court of Georgia of 4 February 2014, on the case “Citizens of Georgia – Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze vs. the Ministry of Labor, Health and Social Affairs”, II.49.

2.3 The case of proportional representation

It is noteworthy that in the case “Citizens of Georgia – Ucha Nanuashvili and Mikheil Sharashidze vs. the Parliament of Georgia”, the Court did not single out the test to determine the constitutionality of the interference with a right to vote. However, proceeding from the Court’s reasoning, it is obvious that an applied standard falls within the scope of the strict scrutiny test.

In the present case, the Court had to determine how paragraphs 1 and 2 of Article 110 of the “Election Code of Georgia”, which wrongly designated election districts and invited disproportionate distribution of parliamentary mandates, were compatible with the requirements of Article 28 of the Constitution of Georgia.⁶⁴

The Court initially noted that an absolute safeguard of equal “weight” of constituency votes in majoritarian election stands beyond the bounds of possibility, because it is very hard to avoid an election of equal numbers of deputies in relatively large and small election districts.⁶⁵ However, “inequality is acceptable as long as there is a legitimate basis to provide reasons for it”.⁶⁶

In this case, the Court considered a legitimate aim of a legislator and territorial representation of municipalities unwarranted, which was founded on the following reasoning.

The Court noted that the administration of the electoral system is a complicated process, which is accompanied by the risk of manipulation of electoral district boundaries. At such times some political parties can delimit electoral district boundaries in accordance with their own political interests. Therefore, a legislator must ensure “the prevention of electoral boundaries from being manipulated”.⁶⁷ Accordingly, in the process of delimitating electoral district boundaries, administrative boundaries, as well as, “geographical specifications” should be taken into account. Moreover, the Court takes a view that depending on the specifics of some regions, it may become necessary “to allow moderate disproportion between electoral districts.”⁶⁸

Thus, the Court held “moderate disproportion” between electoral districts to be admissible. However, it stressed that an introduction of the element of “territorial representation” should not lead to a clear and unjustified inequality of votes⁶⁹, which means that “the difference between electoral

⁶⁴ Judgment No. 1/3/547 of the Constitutional Court of Georgia of 28 May 2015, on the case “Citizens of Georgia - Ucha Nanuashvili and Mikheil Sharashidze vs. the Parliament of Georgia”, II.7, II.8.

⁶⁵ *Ibid.*, II.13.

⁶⁶ *Ibid.*, II.23.

⁶⁷ *Ibid.*, II.28.

⁶⁸ *Ibid.*, II.24.

⁶⁹ *Ibid.*, II.24.

districts should not be more than it is absolutely necessary to ensure the efficient administration of the election”.⁷⁰

After discussing an admissibility of the means to be employed, the Court emphasized its “absolute necessity”, however, did not continue the discussion of other elements of the principle of proportionality and focused on the high intensity of the interference with the right. In particular, the Court noted that in the present case, the means used by the state “had led to a significant degree of deviation and substantially reduced an influence of some voters on the electoral process” as to ensure territorial representation, the legislator mechanically linked electoral districts to the municipalities without taking into account the number of registered voters.⁷¹

Accordingly, the Court found that the state’s actions had engendered “diminution of the influence and the weight of the constituency votes” and deprived it of the opportunity for effective implementation of the active right to vote.⁷² From the standpoint of the Court “this provokes a disproportionate representation and inadequately reflects the representation of the citizens of Georgia in the Supreme Representative Body”.⁷³

Consequently, due to the fact that an intensity of violation was leading to a high degree of disproportion and indefensible, unjustified restrictions of the right to vote, the Court found the disputed norm unconstitutional.

Although the court did not make any direct reference to the application of a strict scrutiny test, its reasoning, which refers to the application of admissible and necessary means as well as high-degree of violation of the state and an exclusion of unjustified disproportion, openly indicates utilization of the strict scrutiny test. However, it will be desirable if the court does not diverge from the practice established on the case of 500 GEL deposit and individually assesses all elements of the protection of the principle of proportionality while determining the constitutionality of the infringement of a right in electoral field.

⁷⁰ Ibid., II.28.

⁷¹ Ibid., II.28.

⁷² Ibid., II.29.

⁷³ Ibid., II.26.

Conclusion

The study has revealed that the Court applies strict scrutiny and rational differentiation tests on assessing the constitutionality of discrimination. In addition, it pays special attention to the protection of the right to equality in the sphere of election and requires inevitable legitimate aim of a state to justify an interference with it.

In the first case, examined in this paper, the Court assesses an interference with a right through the rational differentiation test. The rights protection standard is not so high but on subsequent judgments, the Court deviates from its normal practice and reviews the restrictions on the right to vote through strict scrutiny test.

At the same time, the Court uses the strict scrutiny standard but not all the elements of the test on the case of proportional representation are thoroughly scrutinized. In the future it will be desirable if the Court resorts to practice, that is entrenched within the judgment on 500 GEL deposit while using the strict scrutiny test. If in each particular case, the Court does not assess all elements of the principle of proportionality, it is advisable, not to be satisfied with just discussing a high degree of interference with a right and not to deem as the basis of the unconstitutionality of a high degree regulation of a breach but elaborate about the necessity of an employed means, as well as, to what extent the legitimate aim represents the state's compelling interest, which would not be achievable without using other less restrictive means.