A Guide to Domestic Legal Remedies on Discrimination Cases in Georgia

Council of Europe
2015, Tbilisi

The opinions expressed in this Guide are the author's own and do not reflect the views of either the Council of Europe or any of its institutions

Introduction

The present Guide is prepared within the framework of the Joint Programme between the European Union and the Council of Europe. The programme is aimed at strengthening the capacity of lawyers and human rights defenders in the domestic application of the European Convention on Human Rights and of the Revised European Social Charter.

The Guide intends to assist the lawyers and human rights advocates in the effective application of the domestic legal remedies in discrimination cases.

In order to achieve this objective, the Guide explains the relevant domestic legislation and practices within the spectrum of the Convention for the Protection of Human Rights and Fundamental Freedoms; and offers recommendations for bringing the interpretation of legal provisions and development of judicial practice in compliance with the European standards; points out those instances where this compatibility may only be achieved through legislative amendments, and, accordingly, advises lawyers to apply the respective European standards until then.

The Guide discusses the following standards: the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights; the Framework Convention for the Protection of National Minorities; and the recommendations adopted within the Council of Europe.

Convention for the Protection of Fundamental Rights and Freedoms
Prohibition of Discrimination

Under **Article 14 of the Convention for the Protection of Fundamental Rights and Freedoms**

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Under **Article 1 of Protocol no. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms**

"1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

Article 14 of the Convention complements those provisions of the Convention and its Protocols that guarantee substantive rights. It has no independent existence and it may only have effect in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions.[1] **Article 14** is independent to only a certain degree; namely, its application does not presuppose the violation of a Convention right. **Article 14,** however, may not be invoked in relation to those facts that do not fall within the ambit of one or more substantive provisions of either Convention or its Protocols.[2]

Therefore, "it is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Articles of the Convention."[3] This was further interpreted by the Grand Chamber of the European Court that the prohibition of discrimination "in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applies also to those additional rights, falling within the

---

[1] *Vide, inter alia,* Petrovic v. Austria, application no. 20458/92, judgment of the European Court of Human Rights of 27 March 1998, § 22.

[2] Schalk and Kopf v. Austria, application no. 30141/04, judgment of the European Court of Human Rights of 24 June 2010. § 89.

[3] E.B. v. France, application no. 43546/02, judgment of the Grand Chamber of the European Court of Human Rights of 22 January 2008, § 47.

general scope of any Convention Article, for which the State has voluntarily decided to provide."[4]

Article 1 of Protocol no. 12 to the European Convention enshrines general prohibition of discrimination, *i.e.,* it safeguards equal treatment in respect of the enjoyment of any right set forth by law.

Under the well-established case-law of the European Court, both direct and indirect discrimination is prohibited under **Article 14 of the Convention** and **Article 1 of Protocol no. 12 to the Convention**.[5]

Direct Discrimination

Direct discrimination is composed of the following aspects: treating persons differently, without an objective and reasonable justification, who are in relevantly similar situations.[6] It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment and that this distinction is discriminatory.[7] An objective and reasonable justification implies that difference in treatment must pursue a "legitimate aim" and there must be a "reasonable relationship of proportionality between the means employed and the aim sought to be realised".[8] Discriminatory treatment has as its basis or reason a personal characteristic ("status") by which persons or groups of persons are distinguishable from each other.[9]

Analogous or relevantly similar situation

The Court has established in its case-law that in order for an issue to arise under **Article 14,** there must be a difference in treatment of persons in "analogous

---

[4] *Ibid.,* § 48.

[5] Since the case-law **on Article 14 of the Convention** is more voluminous, the majority of the cases cited concern the aforementioned article. The discussion of the aspects of indirect and direct discrimination in the context of **Article 14** is equally valid in terms of the general prohibition of discrimination enshrined in **Article 1 of Protocol no. 12**.

[6] Willis v. the United Kingdom, application no. 36042/97, judgment of the European Court of Human Rights of 11 June 2002, § 48.

[7] Konstantin Markin v. Russia, application no. 30078/06, judgment of the Grand Chamber of the European Court of Human Rights of 22 March 2012, § 125

[8] *Vide, inter alia,* Petrovic v. Austria, application no. 20458/92, judgment of the European Court of Human Rights of 27 March 1998, § 30.

[9] Kjeldsen, Busk Madsen and Pedersen v. Denmark, application nos. 5095/71; 5920/72; 5926/72, judgment of the European Court of Human Rights of 7 December 1976, § 56.

situations" or "relevantly similar situation".[10] The Court sometimes uses the wording "relevantly similar situation"[11] or merely refers to "similar situation".[12]

The Court has held that it is not required that the compared groups must be identical. The fact that an applicant's situation is not fully analogous to that of others and that there are differences between the various groups does not preclude the application of **Article 14**. An applicant must demonstrate that he or she was in a relevantly similar situation to others who were treated differently.[13]

The applicant, in the case of *Clift v. the United Kingdom*, was a British national. He alleged before the European Court of Human Rights that the different treatment of different categories of prisoners, in terms of early release on parole, depending on the sentences imposed, was based on "other status" in breach of **Article 14 of the Convention**. In order to qualify for release on parole, prisoners serving sentences of more than 15 years' imprisonment required the recommendation of the Parole Board and the approval by the Secretary of State. The prisoners serving sentences of less than 15 years did not require the approval by the Secretary.[14]

The Court observed that when deciding on early release on parole, the same principles were used to assess the risk posed by both categories of prisoners. The refusal to release is not intended to further punish the person but to reflect the results of the assessment by a competent authority on whether a prisoner poses an unacceptable risk upon release. [15] Therefore, the applicant was deemed to have been in the same circumstances as prisoners serving less than 15 years. [16]

Housing reforms resulting in higher rent and reduced security of tenure for tenants following the move to market economy:

Berger-Krall and others contended before the European Court that they were subjected to discriminatory treatment when exercising their specially protected tenancy rights. The case concerned housing reforms resulting in higher rent and reduced security of tenure for tenants following the move to market economy in former Yugoslavia. The applicants compared their situation with two categories of

---

[10] *Vide*, *inter alia,* Konstantin Markin v. Russia, application no. 30078/06, judgment of the Grand Chamber of the European Court of Human Rights of 22 March 2012, § 125.

[11] Graziani-Weiss v. Austria, application no. 31950/06, judgment of the European Court of Human Rights of 18 October 2011, § 56.

[12] Wagner and J.M.W.L. v. Luxembourg, application no. 76240/01, judgment of the European Court of Human Rights of 28 June 2007, § 150.

[13] Clift v. the United Kingdom, application no. 7205/07, judgment of the European Court of Human Rights of 13 July 2010, § 66.

[14] *Idem*.

[15] *Ibid.*, § 67.

[16] *Ibid.,* § 68.

tenants, *viz.*, the holders of "specially protected tenancies" for an indefinite period; their dwellings were not subject to either restitution or denationalisation, and the bona fide buyers of nationalised property.[17]

The European Court was not persuaded that the applicants were in the relevantly similar position as the bona fide buyers. The Court pointed out that the holders of "specially protected tenancies" could not have the same rights as those who acquired a legal title of ownership of a property.[18]

The Court found that the applicants' situation was analogous to that of the holders of protected tenancies whose dwellings were not subject to either denationalisation or restitution; both categories of persons had similar occupancy rights granted to them by the Socialist authorities. However, only the protected tenants of State-constructed dwellings could purchase these properties on significantly favourable terms, namely, they had to pay only approximately 5-10 per cent of the market value of the property. On the other hand, the previously expropriated flats occupied by the applicants could be bought by them at a 30 or 60 percent discount only if, within one year from the restitution of the dwelling, the "previous owner" agreed to sell.[19] The European Court held that there was a difference in the treatment of the two categories of persons – the protected tenants of denationalised dwellings and the protected tenants of other flats. These two groups were in a similar situation in terms of their tenancy rights.[20]

It is worth mentioning here the jurisprudence of the Constitutional Court of Georgia with regard to the assessment criteria of analogous or relevantly similar situations. According to the Constitutional Court, when exercising constitutional review of impugned provisions in terms of **Article 14 of the Constitution**, it must first identify the groups to be compared; whereupon it must establish whether these groups are relevantly equal subjects of law "with regard to a particular legal relation". These groups "in analogous circumstances, should be relevantly equal in terms of particular conditions or relations, and should fall under the same category in terms of substance or criteria. "[21]

The Constitutional Court observed: "law governs a wide area of relations and is directed towards an indefinite group of persons. Therefore, while discussing

---

[17] Berger-Krall and others v. Slovenia, application no. 14717/04, judgment of the European Court of Human Rights of 12 June 2014, § 297.

[18] *Idem.*

[19] *Ibid.,* § 298.

[20] *Ibid.,* § 299.

[21] Citizens' political associations: New Rightists and Conservative Party of Georgia v. the Parliament of Georgia, judgment no. 1/1/493 of the Constitutional Court of Georgia adopted on 27 December 2010, II-2.

Article 14 of the Constitution, the issue of relevant equality of persons should be assessed not *in abstracto* but in the context of a particular legal relation."[22]

Objective and reasonable justification

An objective and reasonable justification for difference of treatment implies that the treatment pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[23] The European Court takes into account a certain margin of appreciation of the Contracting States in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin of appreciation varies according to the circumstances, the subject-matter and its background.[24]

The European Court has repeatedly held that very weighty reasons would have to be put forward to convince the Court that a differential treatment based exclusively on the ground of sex, or sexual orientation is compatible with the Convention.[25] Similarly, a different treatment only on the account of nationality requires particularly serious reasons by way of justification.[26]

A wide margin is usually allowed to the State under the Convention with regard to general measures of economic or social strategy. The national authorities have better knowledge of their society and its needs and therefore, in principle, can better appreciate the public interest based on social or economic grounds than an international judge; the European Court generally respects the Legislature's policies unless it is "manifestly without reasonable foundation." [27]

The Grand Chamber held, *inter alia,* in the case of *Andrejeva v. Latvia* that the applicant's nationality was the only criterion taken into account by the national authorities when providing her with pension; this had to be justified by weighty reasons which the respondent state failed to produce. Accordingly, there was a

---

[22] Citizens of Georgia: Levan Asatiani, Irakli Vatcharadze, Levan Berianidze, Beqa Buchashvili and Gocha Gabodze v. the Ministry of Labour, Healthcare and Social Security of Georgia, judgment no. 2/1/536, of the Constitutional Court of Georgia adopted on 4 February 2014.

[23] Vide, *inter alia,* Petrovic v. Austria, application no. 20458/92, judgment of the European Court of Human Rights of 27 March 1998, § 30.

[24] Abdulaziz, Cabales and Balkandali v. the United Kingdom, application nos. 9214/80; 9473/81; 9474/81, judgment of the European Court of Human Rights of 28 May 1985, § 78.

[25] Karner v. Austria, application no. 40016/98, judgment of the European Court of Human Rights of 24 July 2003, § 37.

[26] Luczak v. Poland, application no. 77782/01, judgment of the European Court of Human Rights od 27 November 2007, § 52.

[27] Stec and others v. the United Kingdom, application nos. 65731/01 and 65900/01, judgment of the Grand Chamber of the European Court of Human Rights of 12 April 2006, § 52.

violation of **Article 14 of the Convention** taken in conjunction with **Article 1 of Protocol No. 1**.[28]

According to the Constitutional Court, given the broad concept of the basic right to equality, the Court cannot have the same approach to each particular case of differential treatment.[29] The degree of reasonableness of differences in treatment varies in each case. "In particular cases, there could be the need for justification of legitimate public aims… in other cases, the need or necessity for limitation should be tangible; sometimes the fact that differentiation is realistic at maximum degree should be sufficient."[30]

Indirect discrimination

Concerning indirect discrimination, the European Court of Human Rights has held that "difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group."[31]

Aspects of indirect discrimination are the following: a neutral rule, criterion or practice; and placement of a protected group at a particular disadvantage.[32]

Discriminatory intent and burden of proof

The existence of burden of proof as well as its correct distribution is of paramount importance for fair trial. On the one hand, a claimant should have an obligation to corroborate his/her claims with evidence so that it is not enough to put forward accusations, and on the other hand, claimants should not be burdened with unreasonable obligation in certain categories of cases where it is objectively difficult to prove the existence of discrimination.

General Policy Recommendation no. 7 adopted by the European Commission against Racism and Intolerance (ECRI)[33] requires from the states to prohibit both

---

[28] Andrejeva v. Latvia, application no. 55707/00, judgment of the Grand Chamber of the European Court of Human Rights of 18 February 2009, §§ 81-92.

[29] *Vide infra*, strict scrutiny and rational basis review by the Constitutional Court of Georgia.

[30] Citizens' political associations: New Rightists and Conservative Party of Georgia v. the Parliament of Georgia, judgment no. 1/1/493 of the Constitutional Court of Georgia adopted on 27 December 2010, II-5.

[31] D.H. and others v. the Czech Republic, application no. 13378/05, judgment of the Grand Chamber of the European Court of Human Rights adopted on 29 April 2008, § 184.

[32] *Handbook on European Non-Discrimination Law*, Council of Europe, 2013, pp. 29-31.

[33] ECRI is a human rights body of the Council of Europe, composed of independent experts, which monitors problems of racism, xenophobia, anti-Semitism, intolerance and discrimination on

direct and indirect discrimination without providing an obligation to prove discriminatory intent:

"The law should provide that, if persons who consider themselves wronged because of a discriminatory act establish before a court or any other competent authority facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no discrimination."[34]

Given the difficulties claimants may face in gathering necessary evidence in discrimination cases, domestic legislation should facilitate proof of discrimination. Paragraph 11 of the ECRI Recommendation invites the states to provide for a shared burden of proof in such cases. In other words, claimants should establish *prima facie* facts allowing for the presumption of discrimination, after which the burden should be of respondents to prove that discrimination did not take place.

Thus, in case of alleged direct racial discrimination, the respondent must prove that the differential treatment has an objective and reasonable justification. For example, if access to a swimming pool is denied to Roma/Gypsy children, it would be sufficient for the claimant to prove that access was denied to these children and granted to non-Roma/Gypsy children. It should then be for the respondent to prove that this denial to grant access was based on an objective and reasonable justification, such as the fact that the children in question did not have bathing hats, as required to access the swimming pool. The same principle should apply to alleged cases of indirect racial discrimination. [35]

In this regard, a judgment of the Supreme Court of Georgia is noteworthy:

"The Court of Cassation agrees with the applicant that both Article 14 of the Constitution of Georgia and Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms recognise the principle of equality before the law and the Court of Cassation pronounces itself on the equality of everyone before the law regardless of race, colour of skin, language, sex, religion, political or other opinions, national, ethnic and social affiliation, origin, property or social status, and place of residence. The Court of Cassation, however, does not agree with the applicant and that the impugned ruling is discriminatory; the Court is not persuaded that the application was not upheld due to the Greek origin of the applicant. Despite the applicant's allegations, the Court of Cassation is not satisfied

---

grounds such as "race", national/ethnic origin, colour, citizenship, religion and language (racial discrimination), www.coe.int/ecri.

[34] ECRI, General Policy Recommendation no. 7, On National Legislation to Combat Racism and Racial Discrimination, 2002, para. 11.

[35] *Vide*, Explanatory Report to General Policy Recommendation no. 7 On National Legislation to Combat Racism and Racial Discrimination, ECRI, 2002, para. 29.

that the courts of Georgia upheld the similar applications lodged by the applicants of Georgian origin and S.G. [applicant] was denied his claim only on the account of the Greek origin. The applicant failed to indicate in the appeal any factual or legal evidence proving this allegation."[36]

The European Court has held that discrimination may result not only from a legislative measure[37], but also from *de facto* situation.[38]

Similarly, according to the Constitutional Court of Georgia,[39] "discrimination exists not only in such cases where the actions of public authorities directly aimed at discriminating against a person or group of persons, but also those which resulted in *de facto* discrimination."[40]

The Constitutional Court has held: "difference in treatment should not be arbitrary. Different treatment amounts to discrimination where the reasons for such treatment are not explained and are devoid of any reasonable basis. Discrimination, therefore, is an arbitrary and unjustified differentiation, ill-founded application of law towards particular groups based on different approach. Therefore, the right to equality prohibits not differential treatment in general but arbitrary and unjustified differentiation only."[41]

---

[36] Judgment no. BS-548-134(K-05) of the Chamber of Civil Cases of the Supreme Court of Georgia adopted on 19 October 2005.

[37] *Vide* Karlheinz Schmidt v. Germany, application no. 13580/88, judgment of the European Court of Human Rights of 18 July 1994, §§ 24-29.

[38] Zarb Adami v. Malta, application no. 17209/02, judgment of the European Court of Human Rights of 20 June 2006, § 76.

[39] *Vide infra* in more details about distribution of burden of proof in the jurisprudence of the Courts of General Jurisdiction of Georgia.

[40] Citizens of Georgia: Levan Asatiani, Irakli Vatcharadze, Levan Berianidze, Beqa Buchashvili and Gocha Gabodze v. the Ministry of Labour, Healthcare and Social Security of Georgia, judgment no. 2/1/536, of the Constitutional Court of Georgia adopted on 4 February 2014, II-19. Vide discussion in: Citizen of Georgia, Ia Ujmajuridze v. the Parliament of Georgia, judgment no. 2/5/556, of the Constitutional Court of Georgia adopted on 13 November 2014, II.25.

[41] Citizens' political associations: New Rightists and Conservative Party of Georgia v. the Parliament of Georgia, judgment no. 1/1/493 of the Constitutional Court of Georgia adopted on 27 December 2010.

The Constitution of Georgia
General Prohibition of Discrimination

Under **Article 14 of the Constitution of Georgia,**

"Everyone is born free and is equal before the law regardless of race, colour of skin, language, sex, religion, political or other opinions, national, ethnic and social affiliation, origin, property or social status, place of residence."

The landmark judgments of the Constitutional Court of Georgia to be used for substantiating constitutional claims

The contents and scopes of **Article 14 of the Constitution of Georgia** have been gradually interpreted in the jurisprudence of the Constitutional Court. The chronology of this interpretation and the highlights of landmark *dicta* of the Constitutional Court are given below. These are the guiding principles that the Court presently uses in the constitutional review of discrimination claims and are recommended to be used in constitutional complaints lodged with the court in order to substantiate the respective claims.

The scope of application – does the Constitution prohibit discrimination with regard to the constitutional rights only or in terms of legal rights in general?

Article 14 of the Constitution of Georgia mentions freedom and equality of an individual. In this regard, interpretation of the Constitutional Court of Georgia is noteworthy:

"This provision refers to equality before law together with the freedom of an individual, which undoubtedly implies the significance of equality for a person's freedom – human rights equally belong to everyone and therefore they must have equal access to them (to their realisation). Only thereupon will be a person fully aware of freedom."[42]

Does **Article 14 of the Constitution of Georgia** ensure equality only with regard to the Constitutional rights, or legal rights as well? Nothing in the text of **Article 14** indicates that the Constitution of Georgia safeguards equality only in respect of the basic rights proclaimed in **Chapter II** of the Constitution, i.e., constitutional rights. To the contrary, **Article 14** refers to equality "before law". Therefore, the Constitutional Court may be requested to pronounce itself not only on alleged discriminatory treatment with regard to the exercise of constitutional rights; the

[42] Citizen of Georgia – Besik Adamia v. the Parliament of Georgia, judgment no. 1/1 /539 of the Constitutional Court of Georgia, adopted on 11 April 2013, para. II-3.

Court may also review constitutionality of different treatment with regard to the realisation of legal rights and interests.

Under the Organic Law of Georgia on the Constitutional Court of Georgia, the Constitutional Court ensures the protection of constitutional rights and freedoms and not of legal rights and interests.[43] However, by way of the review discussed above, the protection of "the basic right to equality before law"[44] safeguarded by **Article 14 of the Constitution of Georgia** will be ensured. This right "generally implies providing equal conditions of legal protection of individuals."[45] "The right to equality differs from other constitutional rights in the way that it does not protect a particular sphere of life. Instead, the principle of equality requires equal treatment in all spheres protected by human rights and legal interests… Any legal provision in conflict with the gist of equality must be the object of constitutional review."[46]

It is noteworthy that the Constitutional Court itself has observed that

"The Legislature bears the obligation to regulate a particular issue in a non-discriminatory manner. This obligation is intrinsic to the process of law-making irrespective of whether it is aimed at regulating constitutional rights or legal interests…"[47]

It is recommended that lawyers request the protection by Article 14 of the Constitution both with regard to the constitutional rights and legal rights.

The constitutional contents and scopes

The constitutional contents

The Constitutional Court of Georgia first discussed the contents of **Article 14** in its **judgment of 7 November 2003**:

---

[43] Article 1 of the Organic Law of Georgia "On the Constitutional Court of Georgia" on the Constitutional Court of Georgia.

[44] *Vide,* Citizen of Georgia - Shota Beridze and others v. the Parliament of Georgia, judgment no. 2/1-392 of the Constitutional Court of Georgia adopted on 31 March 2008, para. II-2.

[45] Citizens' political associations: New Rightists and Conservative Party of Georgia v. the Parliament of Georgia, judgment no. 1/1/493 of the Constitutional Court of Georgia adopted on 27 December 2010, para. II-1.

[46] *Ibid.* II-4.

[47] Citizens of Georgia: Levan Asatiani, Irakli Vatcharadze, Levan Berianidze, Beqa Buchashvili and Gocha Gabodze v. the Ministry of Labour, Healthcare and Social Security of Georgia, judgment no. 2/1/536, of the Constitutional Court of Georgia adopted on 4 February 2014, para. II-21.

"The principle of equality before law implies the equal recognition and respect of the rights of all those individuals that are in similar conditions and have the adequate approach to the statutory issue at stake. This principle covers the law-making activities so that those individuals who find themselves in equal conditions and circumstances are granted the equal privileges and held equally responsible. Different legislative regulation, of course, will not always amount to the breach of the principle of equality. The Legislature may define different statutory conditions; this difference, however, needs to be justified, reasonable and expedient. Furthermore, law must ensure the same degree of differentiation for those in an equal situation."[48]

In the judgment, the Constitutional Court further indicated to those criteria which are used by the European Court of Human Rights for assessing the lawfulness of differential treatment. The Court, however, did not pronounce itself on the exhaustive list of non-discrimination grounds; the following general dictum may still give an idea about the Constitutional Court's approach:

"Any application of law based on any non-discrimination ground shall be impermissible and absolutely unacceptable. This would amount to the breach of both the provisions of international law and the principle of equality before law."[49]

A watershed judgment on **Article 14 of the Constitution** was adopted by the Constitutional Court of Georgia on 31 March 2008.[50] This is one of those landmark judgments that gave for the first time an in-depth interpretation regarding the scope and contents of **Article 14 of the Constitution**; it is in full compliance with the international standards of prohibition of discrimination and gives foundation for the future case-law of the Court. The Constitutional Court observed for the first time in this judgment that "Article 14 of the Constitution not only provides for the basic right of equality before law but also for the fundamental constitutional principle of equality before law."[51] It was further stated that the list of non-discrimination grounds must be broadly interpreted:

"The list of the non-discrimination grounds given in this article, at the first glance, is exhaustive in grammatical sense. However, the objective of the provision goes far beyond the prohibition of discrimination only on the account of a limited list.

---

[48] Citizens of Georgia: Jano Janelidze, Nino Uberi, Eleonora Lagvilava, and Murtaz Todria v. the Parliament of Georgia, judgment no. 2/7/219 of the Constitutional Court of Georgia adopted on 7 November 2003, para. 1.

[49] *Idem.*

[50] Citizen of Georgia - Shota Beridze and others v. the Parliament of Georgia, judgment no. 2/1-392 of the Constitutional Court of Georgia adopted on 31 March 2008.

[51] *Idem.*

The mere grammatical interpretation would have impoverished Article 15 of the Constitution and undermined its importance in the realms of constitutional law."[52]

According to the Constitutional Court, **Article 14** prohibits both direct and indirect discrimination. It "intends to ensure equality before law, not to allow treating relevantly equal as unequal and vice versa."[53] For the first time the Constitutional Court observed that "discriminatory intent is not necessary for finding discrimination. In such cases it is the outcome that counts and not what was intended by the Legislature."[54]

The constitutional scopes

The Constitutional Court of Georgia based on its jurisprudence and the case-law of the European Court pronounced itself on the constitutional scopes of **Article 14**: "an unequal treatment may be justified from a constitutional viewpoint. To this end, an impugned provision must have sufficiently weighty, reasonable and important aims; the law must be substantively justified, non-arbitrary and proportional."[55]

The Constitution took due account of the state's wider margin of appreciation in the social field.[56] It was also ruled that provision of privileges, in the given case, "constituted the optimal, adequate and necessary measure to restore fairness with regard to and protection of the rights of the persons concerned."[57] The Court, thus, pronounced itself on positive discrimination.

Another landmark judgment of the Constitutional Court of Georgia was adopted on **27 December 2010**.[58] The criteria of constitutional review were further elaborated therein.

In accordance with this judgment, the Constitutional Court is first called to rule on the following:

1) whether the persons are relevantly equal; in other words, whether they are from comparable categories, fall within the similar category by means of substance

---

[52] *Idem.*
[53] *Idem.*
[54] *Ibid.,* II-6.
[55] *Ibid.,* II-7.
[56] *Idem.*
[57] *Ibid.,* 17.
[58] Citizens' political associations: New Rightists and Conservative Party of Georgia v. the Parliament of Georgia, judgment no. 1/1/493 of the Constitutional Court of Georgia adopted on 27 December 2010.

or criterion; and whether they are relevantly equal in particular circumstances and relations;

2) the obvious basis of differential treatment of equal persons (alleged direct discrimination) or equal treatment of relevantly unequal persons (alleged indirect discrimination) must be a non-discrimination ground.[59]

The Court must establish the group of persons at which the differential treatment is directed. This is needed in order to ascertain whether an impugned provision causes differential treatment at all:[60]

ა) whether an impugned provision applies to relevantly equal persons; and

ბ) whether an impugned provision treats them differently.[61]

Strict Scrutiny and Rational Differentiation tests

Unfortunately, by virtue of the **judgment of 27 December 2010, the** Constitutional Court built the foundation for incorrect case-law regarding the non-discrimination grounds. The Court's approach that **Article 14 of the Constitution** must be construed broadly and cover those grounds not expressly mentioned therein was maintained.[62] However, starting from this judgment onward, the Constitutional Court attaches different significance to "classical" non-discrimination grounds mentioned in **Article 14 of the Constitution** and "non-classical" non-discrimination grounds that are not mentioned therein; namely, if an impugned provision provides for differential treatment on the account of a classical non-discrimination grounds and/or is characterised with high intensiveness it is subject to strict scrutiny within constitutional review.[63] In those cases, where an impugned provision provides for differential treatment not on the

[59] *Ibid.*, II-2.

[60] Public Defender of Georgia v. the Parliament of Georgia, judgment of the Constitutional Court of Georgia no. 1/1/477 adopted on 22 December 2011, para. II-69.

[61] *Ibid.*, II-72.

[62] Citizens' political associations: New Rightists and Conservative Party of Georgia v. the Parliament of Georgia, judgment no. 1/1/493 of the Constitutional Court of Georgia adopted on 27 December 2010, para. II-4.

[63] *Vide*, *Inter alia, ibid.*, II-6; Citizen of Georgia – Bitchiko Tchonqadze and others v. the Ministry of Energy, judgment no. 2/1/473 of the Constitutional Court of Georgia, adopted on 18 March 2011, para. II-6; Public Defender of Georgia v. the Parliament of Georgia, judgment of the Constitutional Court of Georgia no. 1/1/477, adopted on 22 December 2011, para. II-77; Citizen of Georgia – Besik Adamia v. the Parliament of Georgia, judgment no. 1/1 /539 of the Constitutional Court of Georgia, adopted on 11 April 2013, para. II-20.

account of classical grounds, or interference is not characterised by high intensiveness, the Court will apply rational basis review.[64]

There is a considerable difference between the strict scrutiny and rational basis review in the case-law of the Constitutional Court of Georgia. The first implies the use of proportionality test and by way of justifying a legitimate aim it is required to prove that the state interference was absolutely necessary, and there is "insurmountable state interest".[65] On the other hand, within the scopes of rationale basis review it suffices "a) to prove the reasonableness of differential treatment, inter alia, when it is obvious that differentiation is realistic, imminent or necessary at maximum degree; b) there is a realistic and rational link between the objective reason of the differentiation and its outcome."[66]

In the **judgment of 27 December 2010**, the significance of "classical" non-discrimination ground was highlighted through the following observations:

"Historically, the constitutions would enumerate those characteristics according to which individuals fell under the category of a particular group based on their personal and physical features, cultural indicators or social origin. The constitutions would refer to those characteristics because they were the very reason of ample experience of discriminating against individuals and the constitutions were motivated to refer to them expressly due to the fear of such treatment to continue in the future too."[67]

The judgment offers extensive discussion on other factors apart from the above characteristics that warrant differential approach of the Constitutional Court towards the impugned provisions.[68]

However, the Constitutional Court concludes that it is the "different treatment based on classical, specific non-discrimination grounds that warrant strict scrutiny by the Court."[69]

The Constitutional Court's reasoning about the Constitution of Georgia only expressly providing for those grounds in **Article 14 of the Constitution** that had

---

[64] *Vide*, *inter alia,* Citizen of Georgia – Bitchiko Tchonqadze and others v. the Ministry of Energy, judgment no. 2/1/473 of the Constitutional Court of Georgia, adopted on 18 March 2011, para. II-6.
[65] *Vide*, *inter alia,* Citizens' political associations: New Rightists and Conservative Party of Georgia v. the Parliament of Georgia, judgment no. 1/1/493 of the Constitutional Court of Georgia, adopted on 27 December 2010, para. II-6.
[66] *Vide*, *inter alia,* Citizen of Georgia – Bitchiko Tchonqadze and others v. the Ministry of Energy, judgment no. 2/1/473 of the Constitutional Court of Georgia adopted on 18 March 2011, para. II-6.
[67] *Ibid.*, II-4.
[68] *Ibid.*, II-5.
[69] *Ibid.*, II-6.

historically used as discrimination grounds in Georgia, and therefore those "non-classical" grounds not explicitly mentioned therein being of secondary importance and relevance is incorrect both from historical and legal perspectives. According to this reasoning, it must be assumed that there was "an ample historical experience" of discrimination on the account of skin colour in Georgia by the time of adoption of the Constitution (1995) and that was why this non-discrimination ground was expressly mentioned in **Article 14 of the Constitution**.

As regards the legal perspective, the Constitutional Court's approach fails to comply with the case-law of the European Court of Human Rights, since the Strasbourg Court does not recognise the hierarchy of non-discrimination grounds *per se.*

Marital status is, e.g., not expressly mentioned in **Article 14 of the Convention** as a non-discrimination ground. This protected ground may, *inter alia,* cover the status of a parent. The status of a parent, in its turn, may cover guardians and carers apart from biological (natural) parents.[70]

In the case of *McMichael v. the United Kingdom*, the applicant – a child's natural father- alleged that he was a victim of discriminatory treatment. Under the law, he could not be his children's guardian, or participate in the administrative and judicial proceedings concerning the care of their children unless he married the children's mother.[71] The European Court did not differentiate among the marital status and the non-discrimination grounds expressly mentioned in **Article 14 of the Convention,** and applied as usual the well-established test under which differential treatment amounts to discrimination if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[72]

The Strasbourg Court certainly acknowledges that the margins of appreciation allowed to states in assessing whether a differential treatment is justified and to what extent vary; they vary according to the circumstances, the subject-matter and its background.[73] This means, the European Court, when pronouncing itself on proportionality, assesses what is more important in a particular case – a legitimate aim or an individual right.

---

[70] Interights, Non-Discrimination in International Law, A Handbook for Practitioners, 2011 Edition, p. 212.

[71] McMichael v. the United Kingdom, application no. 16424/90, judgment of the European Court of Human Rights of 24 February 1995, § 94.

[72] *Ibid.,* § 97. *Vide*, later judgments: Mizzi v. Malta, application no. 26111/02, judgment of the European Court of Human Rights of 12 January 2006.

[73] Abdulaziz, Cabales and Balkandali v. the United Kingdom, application nos. 9214/80; 9473/81; 9474/81; judgment of the European Court of Human Rights of 28 May 1985, § 78.

The Constitutional Court too uses the argument about the different margins of appreciation:

"The margins of appreciation enjoyed by states vary, especially, considering the non-discrimination ground and the field of social life. Accordingly, the scales of assessment and the reasonableness of differential treatment are different. In some cases, it may be needed to prove the existence of a legitimate public aim (national security, public order, and public aims provided by the Constitution itself for a particular constitutional right); in other cases the need for limitation must be tangible; sometimes it is sufficient that differentiation is realistic to a maximum degree, e.g., differentiation caused by a reason that a particular situation cannot be actually avoided. In this latter case, discrimination cannot exist if unequal treatment is subject to reasonable explanation, justification and rationalisation."[74]

Unlike the European Court, the Constitutional Court of Georgia, not at the stage of assessing the proportionality of differential treatment but at the stage of deciding on the assessment tool, automatically categorises and differentiates between incidents based on "classical" and "non-classical" non-discrimination grounds. It may be concluded that the Constitutional Court applied the discriminatory method of assessing constitutionality of non-discrimination grounds having equal significance.

The Constitutional Court of Georgia, in this manner, indirectly establishes the hierarchy of human rights, since the non-discrimination grounds are to certain extent related to those rights. E.g., since marital status is not expressly mentioned in **Article 14 of the Constitution** but the ground of "political opinions" is, the Constitutional Court indirectly deems that the right to freedom of expression generally (and not based on particular circumstances) is more important than the right to respect for private and family life; because, if differential treatment is allegedly based on political opinions, the Constitutional Court automatically applies strict scrutiny and in case of marital status, the application of strict scrutiny test will depend on another vague criterion which is "how intensive an interference is".

E.g., it was observed in the **judgment of 4 February 2014** that "sexual behaviour and orientation does not fall under any of classical non-discrimination grounds mentioned in Article 14 of the Constitution. Therefore, differentiation is not related to any of the classical non-discrimination grounds in Article 14 of the

[74] *Idem.*

Constitution and there is no precondition for the application of strict scrutiny test."[75]

In this context, the recommendation of the Committee of Ministers of the Council of Europe should be mentioned. The recommendation concerns the measures to combat discrimination on grounds of sexual orientation or gender identity.[76] According to the recommendation, neither cultural, traditional nor religious values, nor the rules of a "dominant culture" can be invoked to justify any form of discrimination, including on grounds of sexual orientation or gender identity.[77]

As pointed out above, the choice of the test also depends on how intensive differential treatment is. In the **judgment of 4 February 2014**, the Constitutional Court applied strict scrutiny test as it took into account the fact that "relevantly equal persons finding themselves in considerably different situations, in other words, how distanced are equal persons from equal opportunities to be involved in a particular social relation as the result of differentiation."[78]

Despite the number of judgments on **Article 14 of the Constitution**, the criterion of "intensive interference" still remains vague due to the following reasons:

There is no discrimination where persons in relevantly similar situations are not treated differently. The notions of "considerably different" and "inconsiderably different treatment" are irrelevant for an alleged victim of discrimination, are unknown to the European Court's case-law and the Constitutional Court has failed to point out some tangible indicators of these notions.

It is also significant that the criterion of "intensive interference" elaborated by the Constitutional Court fits the incidents of alleged direct discrimination. This criterion, even if it had any substantive and functional connotation, would most likely be useless in the cases of alleged indirect discrimination.

The Constitutional Court has explained that when establishing such a hierarchy among non-discrimination grounds, it is guided by the constitutions of foreign

---

[75] Citizens of Georgia: Levan Asatiani, Irakli Vatcharadze, Levan Berianidze, Beqa Buchashvili and Gocha Gabodze v. the Ministry of Labour, Healthcare and Social Security of Georgia, judgment no. 2/1/536, of the Constitutional Court of Georgia adopted on 4 February 2014.

[76] Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.

[77] *Ibid.,* preamble.

[78] Citizens' political associations: New Rightists and Conservative Party of Georgia v. the Parliament of Georgia, judgment no. 1/1/493 of the Constitutional Court of Georgia adopted on 27 December 2010, para. II-6; Citizens of Georgia: Levan Asatiani, Irakli Vatcharadze, Levan Berianidze, Beqa Buchashvili and Gocha Gabodze v. the Ministry of Labour, Healthcare and Social Security of Georgia, judgment no. 2/1/536, of the Constitutional Court of Georgia adopted on 4 February 2014, para. II-30.

countries and international instruments:

"Article 14 of the Constitution of Georgia, as well as the constitutions of foreign countries and the international instruments on human rights give the list of certain characteristics, which indicate to the Legislature on which grounds unequal treatment should not be based. The grounds indicated in the list stem from the factors that express an individual's identity is based on the principle of respecting an individual's dignity and have their historical preconditions. Differentiation on the account of these grounds constitutes high risk cases of discrimination and requires special attention from the legislature. This is preconditioned by inadmissibility of any kind of a hierarchy between individuals' social status. The existence of the list indicates to the priorities attached to the limitation of the incidents of differentiation."[79]

Whereas, according to the Explanatory Report on Protocol no. 12 to the European Convention on Human Rights:

"The list of non-discrimination grounds in Article 1 [of Protocol no. 12 to the Convention] is identical to that in Article 14 of the Convention. This solution was considered preferable over others, such as expressly including certain additional non-discrimination grounds (for example, physical or mental disability, sexual orientation or age), not because of a lack of awareness that such grounds have become particularly important in today's societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted *a contrario* interpretations as regards discrimination based on grounds not so included. It is recalled that the European Court of Human Rights has already applied Article 14 in relation to discrimination grounds not explicitly mentioned in that provision."[80]

And conversely, the Constitutional Court of Georgia, stemming from the fact that **Article 14 of the Constitution** was drafted on the analogy of international instruments that had been drafted decades back[81] and that the authors of the Constitution did not take into account the jurisprudence of international courts and organisations while construing the relevant provisions in the light of present-

---

[79] Citizen of Georgia – Bitchiko Tchonqadze and others v. the Ministry of Energy, judgment no. 2/1/473 of the Constitutional Court of Georgia adopted on 18 March 2011, para. II-1.

[80] Explanatory Report on Protocol no. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Committee of Ministers of the Council of Europe on 26 June 2000, paras. 20, http://conventions.coe.int/Treaty/en/Reports/Html/177.htm [Last visited 30.11.2014].

[81] The *numerus clausus* list is not implied in this context as the majority of international agreements contains an open-end provision.

day conditions[82], makes the same mistake and differentiates between classical and non-classical non-discrimination grounds.

It is worth mentioning that strict scrutiny and rational basis review are carried out by the Supreme Court of the United State of America in a completely different context. According to the jurisprudence of the Supreme Court of the USA, the choice of the respective test depends on whether there was an interference in an individual legal interest (rational basis review is carried out),[83] or a constitutional right (strict scrutiny is carried out).[84]

Based on the above discussion, it is recommended that lawyers request the application of the strict scrutiny test irrespective of the prohibited ground and intensiveness of interference.

[82] *Vide*, Nana Mchedlidze "Review of the Right to Property" under the Draft Constitutional Amendments, http://www.parliament.ge/publicdebates/article_2.pdf, [Last visited 30.11.2014].
[83] *Vide*, *inter alia*, Nebbia v. New York, 291 U.S. 502 (1934).
[84] *Vide*, *inter alia*, Griswold v. Connecticut, 381 U.S. 479 (1965).

Equal Development of the Country

Under **Article 31 of the Constitution of Georgia,**

"The State shall guarantee equal socio-economic development for all regions of the country. Special privileges to ensure the socio-economic progress of high mountain regions shall be established by law."

Constitutional contents

The fact that **Article 31 of the Constitution** falls under **Chapter Two of the Constitution** does not mean that the Article necessarily guarantees a basic right which can be invoked in the Constitutional Court. **Article 31** expresses certain solidarity on the part of the state towards its regions. In this regard, the relation has two subjects in the form of a state and its regions; the Constitution does not imply an individual in this relation.[85]

The first sentence of **Article 31 of the Constitution** does not establish a basic right, its contents or scope. Hereby the future actions of the state instead of any pre-existing, acknowledged and guaranteed right is implied.[86] The constitutional review of an impugned provision cannot be separately effected in terms of this article. It can only be done so jointly with the provisions establishing basic rights. The compatibility of the impugned provisions with constitutional principles cannot be assessed in isolation: "while constitutional principles do not establish basic rights, the impugned normative act is subject to review in terms of fundamental constitutional principles as well, taken together with particular constitutional provisions. The discourse, in this regard, should be in the context as a whole."[87]

Article 31 does not guarantee a substantive right and therefore only serves a complementary purpose in constitutional proceedings. Alleged discriminatory treatment cannot accordingly be argued based on Article 31 of the Constitution alone.

---

[85] Citizen of Georgia Shota Beridze and others v. the Parliament of Georgia, judgment no. 2/1-392 of the Constitutional Court of Georgia adopted on 32 March 2008, II-19.

[86] *Ibid.*, II-20.

[87] *Ibid.*, II-21.

Right to Marry, Family Welfare and Equality between Spouses

Article 12 of the European Convention on Human Rights, which guarantees the right to marry, reads as follows:

"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

Article 5 of Protocol no. 7 to the European Convention which guarantees equality between spouses reads as follows:

"Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This article shall not prevent States from taking such measures as are necessary in the interests of the children."

Under Article 36.1 of the Constitution of Georgia,

"1. Marriage shall be based on the equality of rights and free will of spouses."

Article 1106 of the Civil Code of Georgia defines marriage as the union of a woman and a man:

"Marriage shall be a voluntary union of a woman and a man aimed at founding a family, which shall be registered by a territorial office of LEPL Public Services Development Agency managed by the Ministry of Justice of Georgia …"

Right to marry

Article 12 of the Convention adopted in 1950 expressly mentions a woman and a man, whereas Article 5 of Protocol no. 7 adopted in 1984 generally refers to spouses without specifying their gender. The Constitution of Georgia of 1995 refers to spouses and the Civil Code of 1997 mentions a woman and a man.

The reference to "the national laws" in Article 12 of the Convention is significant. The European Court recognises that "the exercise of the right to marry is subject to the national laws of the Contracting States." The Court, however, further explains that the limitations introduced by a state "must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is

impaired".[88] Therefore, while according to the wording of **Article 12 of the Convention** considers the regulation of the right to marry to be falling within the competence of national authorities, the European Court still reviews the application of domestic legislation in terms of its compatibility with the Convention.

In this context, it is important to discuss the change in the approach of the European Court towards transsexuals' right to marry and those who underwent gender reassignment surgery and wish to marry a person from the opposite sex. Initially, the European Court used to take into account the traditional concept of marriage and therefore justified the use of biological criteria by a state to determine a person's sex for the purpose of marriage. In accordance with earlier judgments of the Court, this was a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry.[89]

Later, the European Court of Human Rights departed from this approach. It found that determination of gender by purely biological criteria was no more acceptable in the context of the right of a man and woman to marry as guaranteed by **Article 12**. The Court took into account major social changes in the institution of marriage that took place since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. Furthermore, widespread acceptance of the marriage of transsexuals was noted as well. Accordingly, the Court found no justification for barring the transsexual from enjoying the right to marry under any circumstances.[90]

The European Court had to pronounce itself for the first time on the right to marry of same-sex couples in the case of *Schalk and Kopf v. Austria*. The applicants were a same-sex couple living in a stable partnership. They asked the Austrian authorities for permission to marry. Their request was refused on the ground that marriage could only be contracted between two persons of opposite sex. Before the European Court of Human Rights, the applicants alleged to be discriminated against on the account of their sexual orientation in violation of **Article 12**.[91]

---

[88] B. and L. v. the United Kingdom, application no. 36536/02, judgment of the European Court of Human Rights of 13 September 2005, § 34.

[89] Sheffield and Horsham v. the United Kingdom, applications nos. 22885/93, 23390/94, judgment of the Grand Chamber of the European Court of Human Rights of 30 July 1998, § 67; Cossey v. the United Kingdom, application no. 10843/84, judgment of the European Court of Human Rights of 27 September 1990, § 46.

[90] Christine Goodwin v. the United Kingdom, application no. 28957/95, judgment of the Grand Chamber of the European Court of Human Rights of 11 July 2002, §§ 100-04.

[91] Schalk and Kopf v. Austria, application no. 30141/04, judgment of the European Court of Human Rights of 24 June 2010.

The European Court observed that there was no European consensus reached on the matter of same-sex marriage. The national authorities were best placed to assess and regulate the needs of society in this field, given that marriage had deep-rooted social and cultural connotations that greatly differed from one society to another.[92]

The Court found that the Convention did not oblige the Austrian authorities to grant a same-sex couple access to marriage. Therefore, there was no violation of Article 12.[93]

In its above judgment, the Court certainly did not depart from its well-established practice to interpret and apply the Convention in the light of present-day conditions.[94] The Court merely did not agree with the applicants that the institution of marriage underwent such social changes as to include same-sex marriage as well.[95] By the time of adopting the judgment, there was no European consensus on the matter since no more than six (Belgium, the Netherlands, Norway, Portugal, Spain, and Sweden) out of forty-seven Convention States allowed same-sex marriage.[96]

European consensus does not imply the absolute majority of the Council of Europe members. On the matter of conscientious objection, the Strasbourg Court held that at the material time there was "nearly" a consensus among all Council of Europe member states, since the "overwhelming majority" of which (42 member states) had already recognised in their law and practice the right to conscientious objection.[97]

In conclusion, at present, the European Court of Human Rights does not consider that Article 12 of the Convention obliges Council of Europe member states to grant access to same-sex marriage.

---

[92] *Ibid.* § 62.
[93] *Ibid.* §§ 63-64.
[94] *Vide*, about the doctrine of a living instrument, *inter alia,* E.B. v. France, application no. 43546/02, judgment of the Grand Chamber of the European Court of Human Rights of 22 January 2008, § 92.
[95] Schalk and Kopf v. Austria, application no. 30141/04, judgment of the European Court of Human Rights of 24 June 2010, § 58.
[96] *Ibid.,* § 27.
[97] Bayatyan v. Armenia, application no. 23459/03, judgement of the Grand Chamber of the European Court of Human Rights of 7 July 201, § 103.

Family welfare

Under **Article 8 of the Convention,**

"1. Everyone has the right to respect for his private and family life...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Under **Article 36.2 of the Constitution of Georgia,**

"2. The state shall promote family welfare."

The European Court has found that relationship of a same-sex couple falls within the notion of "private life"[98] and "family life" within the meaning of **Article 8 of the Convention**.[99]

The Court does not agree that the right to same-sex marriage stems from **Article 8** in conjunction with **Article 14 of the Convention**. The Convention should be read as a whole and its articles should be interpreted in harmony with one another.[100] Therefore, since the Court found that "Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage, Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either."[101]

Stemming from the above-mentioned, at present, the states, including Georgia, are still free, under **Article 12 of the Convention** as well as under **Article 14** taken in conjunction **with Article 8**, to restrict access to marriage to different-sex couples.[102] However, once European consensus is reached, Georgia will have to harmonise its legislation and practice with the European standards of human

---

[98] Schalk and Kopf v. Austria, application no. 30141/04, judgment of the European Court of Human Rights of 24 June 2010, § 90.
[99] *Ibid.,* § 94.
[100] Johnston and Others v. Ireland, application no. 9697/82, judgment of the European Court of Human Rights of 18 December 1986, § 57).
[101] Schalk and Kopf v. Austria, application no. 30141/04, judgment of the European Court of Human Rights of 24 June 2010, § 101.
[102] *Ibid.*, §108.

rights.[103] Otherwise, lawyers will have to allege discriminatory treatment with the use of the respective European standards discussed above.

Equality between Spouses

Article 5 of Protocol no. 7 to the European Convention, which guarantees equality between spouses, reads as follows:

"Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children."

Under Article 36.1 of the Constitution of Georgia,

"1. Marriage shall be based on the equality of rights and free will of spouses."

Under the Explanatory Report to Protocol no. 7 to the European Convention, Article 5 implies equality of rights and responsibilities as to marriage, during marriage and in the event of its dissolution.[104] The rights and responsibilities are of a private law character. The terms of Article 5 should be interpreted in the way that equality must be ensured only in the relations between the spouses themselves, in regard to their person or their property and in their relations with their children. Article 5, therefore, does not apply to other fields of law, such as administrative, fiscal, criminal, social, ecclesiastical or labour laws.[105]

The fact that Article 5 provides for equal rights and responsibilities of spouses in their relations with their children shall not prevent States from taking such measures as are necessary in the interests of the children.[106] In these regards, Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination) of the Convention are relevant.

Article 5 concerns spouses and therefore does not apply to either the period preceding marriage or conditions of capacity to enter into marriage provided by national law.[107]

---

[103] Cf. Citizen of Georgia, Salome Tsereteli-Stivens v. the Parliament of Georgia, judgment of the Constitutional Court no. 2/2425, II-12 adopted on 23 June 2008.

[104] Explanatory Report to Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Committee of Ministers of the Council of Europe, § 34. http://conventions.coe.int/Treaty/en/Reports/Html/117.htm, [last visited 30.11.2014].

[105] *Ibid.,* § 35.

[106] *Ibid.,* § 36.

[107] *Ibid.,* § 37.

And finally, **Article 5 of Protocol no. 7** should not be understood as preventing national authorities to take into account all relevant factors during division of property in divorce proceedings.[108]

The European Commission of Human Rights has confirmed that **Article 5 of Protocol no. 7** is only concerned with spousal rights and obligations of private law character. "Accordingly, the State's obligation under Article 5 involves essentially a positive obligation to provide a satisfactory legal framework under which spouses have equal rights and obligations concerning such matters as their relations with their children."[109]

The European Court of Human Rights shares the opinion of the European Commission about the connotation of positive obligations in this context.[110] It is noteworthy that while the European Court does not review compliance of domestic law with the Convention *in abstracto*, in these cases it looks into the compatibility of legislative framework within a state with the European Convention.[111]

Article 5 of Protocol no. 7 does not prevent the states to take measures in the best interests of children. When reviewing the lawfulness of these measures, the European Court, based on the Explanatory Report of the Committee of Ministers applies the test of "necessity in a democratic society" given in **Article 8.2 of the Convention**. In other words, based on domestic legislation, a state may interfere in the right to equality between spouses in order to reach a legitimate aim and this interference must be necessary in a democratic society. In the established case-law of the European Court "the notion of necessity implies that the interference complained of corresponds to a pressing social need, and in particular that it is proportionate to the legitimate aim pursued. In determining the necessity of interference, a margin of appreciation is left to the Contracting States. This power of appreciation is not, however, unlimited and in exercising it supervisory function the Court must determine whether the reasons adduced to justify the interference at issue are "relevant and sufficient".[112]

---

[108] *Ibid.,* § 38.

[109] Purtonen v. Finland, application no. 32700/96, decision of the European Commission of Human Rights of 9 September 1998, §1; Cernecki v. Austria, application no. 31061/96, decision of the European Court of Human Rights of 11 July 2000.

[110] Monory v. Hungary and Romania, application no. 71099/01, decision of the European Court of Human Rights of 17 February 2004, § 4.

[111] *Idem.*

[112] Cernecki v. Austria, application no. 31061/96, decision of the European Court of Human Rights of 11 July 2000.

Minority Rights

Under **Article 38 of the Constitution of Georgia,**

"1. Citizens of Georgia shall be equal in their social, economic, cultural, and political lives irrespective of their national, ethnic, religious, or linguistic origin. In accordance with universally recognised principles and rules of international law, citizens of Georgia shall have the right to develop their culture freely, use their mother tongue in private and in public, without any discrimination and interference.

2. In accordance with universally recognised principles and rules of international law, the realisation of minority rights shall not oppose the sovereignty, state order, territorial integrity, and political independence of Georgia."

Regarding **Article 38 of the Constitution of Georgia**, the Constitutional Court of Georgia observed in its ruling of 31 March 2006 that the aforementioned provision is *lex specialis* in relation to **Article 14 of the Constitution** since "it establishes equality as one of the means of the protection of minority rights."[113] The Court further explains that "minority is a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."[114]

---

[113] Nodar Tsotniashvili – President of "Objective 2005," International Union for the protection of the rights of officers of military forces, war veterans and soldiers; Elver Kupatadze – President of the Union of the Council of veterans of war, labour and military forces of Georgia; Ioseb Mestiashvili – President of "Abjari", Union of Social Security of retired and disabled policemen of Georgia; Arsen Razmadze – President *a.i.* of "Imedi", Independent Trade Union of military veterans of Georgia; Karlo Gardapkhadze – President of Union of war veterans and disabled war veterans of Georgia; Vazha Chaduneli – President of "Union of Georgian Chernobilians"; Nino Kvesadze – President of "Imedi", Union of social security and protection of the rights of the families of the soldiers perished for the independence and territorial integrity of Georgia; Genadi Kvernadze – President of "Pari da Makhvili", Union of Soldiers, war veterans and disabled war veterans of Georgia; Simon Sharadze – President of "Khikhani Ushba", International Association for the protection of the rights of IDPs from mountainous regions (eco-migrants); Temur Kozolashvili – President of "Ghirseba", Union for the protection of the interests and social security of retired, disabled and acting policemen and their family members; Karlo Tsulaia – President of "Vake-Saburtalo 2002", Charity Union **against the Parliament of Georgia**, Inadmissibility Ruling no. 2/8/366 adopted by the Constitutional Court of Georgia on 31 March 2006.

[114] *Idem.*

The Constitutional Court used the same definition in the ruling of 2 June 2006.[115] In both cases, the Court found that the impugned normative act did not concern the minorities and therefore the Constitutional Court lacked jurisdiction to examine the constitutionality of the respective impugned act.

The definition given by the Constitutional Court in its rulings mostly coincides with the definition given in 1977 by Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, according to which a minority is:

"A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."[116]

The only discrepancy between these two definitions is that the Constitutional Court omitted the reference to minorities "being nationals of the State".

On 20 May 2014, the Constitutional Court of Georgia addressed the State Constitutional Commission[117] with proposals related to Chapter II of the Constitution and respective amendments. One of the proposals concerns the need to be specified by the Constitution whether citizenship is implied in nationality:

"Under Article 14 of the Constitution, everyone is equal before the law regardless of, inter alia, his/her national and ethnic origin. It is not clear whether citizenship should be implied in nationality and what differentiates these two protected grounds. In this regard, Article 38.1 of the Constitution should be taken into consideration as it provides for equality among the citizens of Georgia, regardless, inter alia, of their nationality thus differentiating to certain degree between citizenship and nationality."[118]

The Member States of the Council of Europe have different approaches as to how to define a national minority. Due to this diversity, the Framework Convention for the Protection of National Minorities adopted under the auspices of the

---

[115] Citizens of Georgia – Nodar Tsotniashvili, Badri Matcharashvili, Shota Somkhishvili, Petre Sapniani, Dimitri Gogoladze, Jaribek Paradiani, Ludvig Grigoriani, Shaliko Bezhuashvili, Asim Chitrekashvili, Levan Tokmatchiani, Norik Sumbatiani, Ivane Rostiashvili, Rafil Skhvachkhiani, Archil Pukhashvili, Sergo Egiazrarovi, Givi Tchabukiani **against the Parliament of Georgia**, Inadmissibility Ruling no. 2/10/383 adopted by the Constitutional Court of Georgia on 2 June 2006.

[116] *Vide*, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Publication, New York, 1979, p. 96.

[117] Established under Parliamentary Resolution of 4 October 2013.

[118] http://constcommission.ge/10-1 [last visited 30.11.2014].

Council of Europe does not contain any definition of a national minority at all.[119] Accordingly, the Framework Convention allows each Contracting State the discretion in extending the application of the Convention to certain groups within its jurisdiction.

Some of the Council of Europe Member States used the discretion granted by the Framework Convention to make a declaration when depositing the respective instrument of ratification, accession or approval with the CoE Secretary General. The majority of declarations define a national minority, *inter alia*, by citizenship. As an exception several states do not refer to citizenship in their declarations.

E.g., the Kingdom of Denmark applies the Framework Convention to the German minority in South Jutland. According to the Republic of Latvia, the scope of application of the Convention is extended to citizens of Latvia who differ from Latvians in terms of their culture, religion or language, who have traditionally lived in Latvia for generations and consider themselves to belong to the State and society of Latvia, who wish to preserve and develop their culture, religion or language. Persons who are not citizens of Latvia or another State but who permanently and legally reside in the Republic of Latvia, who do not belong to a national minority within the meaning of the Framework Convention for the Protection of National Minorities as defined in this declaration, but who identify themselves with a national minority that meets the definition contained in this declaration, shall enjoy the rights prescribed in the Framework Convention, unless specific exceptions are prescribed by law. The Kingdom of the Netherlands declares that the convention is applied to the Frisians. The Republic of Slovenia without any reference to citizenship extends the application of the Convention to the autochthonous Italian and Hungarian National Minorities. In accordance with the Constitution and internal legislation of the Republic of Slovenia, the provisions of the Framework Convention also apply to the members of the Roma community who live in the Republic of Slovenia. And finally, the national minorities in Sweden are Sami, Swedish Finns, Tornedalers, Roma and Jews. When depositing the instrument of ratification, Georgia has not made any declarations and thus has not defined its national minorities for the purposes of the Framework Convention.[120]

As mentioned above, Georgia is allowed under the Framework Convention to define a national minority. This discretion, however, has its limits and the state should adopt its decision in good faith, and in accordance with general principles

---

[119] http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm; https://matsne.gov.ge/index.php?option=com_ldmssearch&view=docView&id=1244853&lang=ge [last visited 17.11.2014].

[120] http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=157&CM=8&DF=24/11/2014&CL=ENG&VL=1 [last visited 17.11.2014].

of international law and international human rights law.[121] It is of paramount importance to respect the principle of free self-identification enshrined in Article 3 of the Framework Convention. Under this principle, persons should be entitled to decide themselves whether to belong or not to belong to a national minority and this decision should be based on an objective criterion pertaining to their identity, such as their religion, language, traditions or cultural heritage. It is noteworthy that the Advisory Committee of the Framework Convention for the Protection of National Minorities, consisting of independent experts and being in charge of monitoring the implementation of the Convention, supervises the observance of the scopes of discretion granted to the states. The Advisory Committee makes sure that the states do not exclude arbitrarily a certain group willing to be considered as a national minority in the given state; and the Committee adopts relevant recommendations to this effect.[122]

Until the legislative amendments are enforced, lawyers are recommended to apply the European standards discussed above.

[121] In particular, Preamble, **Articles 1-2 of the Framework Convention**.

[122] *Vide,* **Article 3 of the Framework Convention** and Second Opinion on Serbia adopted by the Advisory Committee on 19 March 2009. Note, the recommendations given in paras: 24, 39, 42, 51, 142, 249, and 250; https://www.coe.int/t/dghl/monitoring/minorities/3_fcnmdocs/PDF_2nd_OP_Serbia_en.pdf [last visited 30.11.2014].

Compensation for the Damage Inflicted by the Soviet Totalitarian Regime on the Religious Entities Existing in Georgia

In the context of establishing equality between the religious organisations existing in Georgia, the measures aimed at the realisation of the requirements of **Article 38 of the Constitution** are noteworthy.

On 27 January 2014, the Government of Georgia approved The Rule on Implementation of Certain Measures Concerning Partial Compensation of Damage Inflicted under the Soviet Totalitarian Regime to the Religious Entities Existing in Georgia (the Rule).[123]

The Public Defender welcomed the decision reached on compensating the religious entities, other than the Georgian Apostolic Autocephalous Orthodox Church, existing in Georgia.[124] The NGO sector, however, considers the approach to be discriminatory:

"It is discriminatory to only authorise four religious organisations to request compensation for damages; there were many other religious associations that fell victim to the persecution and suffered damages in the Soviet Union, among them, Jehovah's Witnesses, Lutheran Church, etc. Such a selective approach to religious organisations and the priority given to the Georgian Orthodox Church gives rise to the feeling of inequality among other religions."[125]

Apart from the fact that compensation of the religious entities other than those expressly mentioned in Resolution no. 117 (hereinafter the "Resolution") approving the Rule does not fall within the scope of the application of the Resolution, experts' opinions on the effectiveness of attempts to establish equality of these four entities with the Georgian Orthodox Church are also noteworthy. The primary problem is that the advantageous position of the Georgian Apostolic Autocephalous Orthodox Church is established by the Constitutional Agreement, which cannot be redeemed by the Government's resolution. Moreover, the Resolution applies to the Islamic, Judaic, Roman-Catholic and Armenian confessions registered in Georgia in the form of a legal entity of public law before the enactment of this Resolution.[126]

---

[123] http://www.government.gov.ge/files/40370_40370_785819_117270114.pdf, [last visited 30.11.2014].

[124] Public Defender of Georgia, *The Situation of Human Rights and Freedoms in Georgia*, 2013, p. 159, http://ombudsman.ge/uploads/other/1/1934.pdf, [last visited 30.11.2014].

[125] *Vide*, e.g., Georgian Democracy Initiative (GDI), Report on Human Rights and Freedoms, 2014, First Half-Year, p. 27, http://gdi.ge/uploads/other/0/206.pdf, [last visited 30.11.2014].

[126] Iago Khvichia, *Instead of Equality*, 2014, http://tlconsulting.ge/index.php?do=full&id=4986, [last visited 30.11.2014].

Religious entities were not obliged to undergo registration prior to the enactment of the Resolution. Accordingly, under the Resolution, "those random religious organisations will be funded that in the condition of non-mandatory terms had sought registration in the form of a legal entity of public law, whereas other similar organisations that had not sought registration, will not be," – observes the expert. It is noteworthy in this context that the Georgian Apostolic Autocephalous Orthodox Church is not obliged to register as a legal entity of public law. Furthermore, the avenues offered by the Resolution to redeem this situation are hardly feasible.[127]

Based on the above considerations, it can be concluded that not only the compensation is symbolic according to the Resolution itself, the procedure thereof is less likely to ensure equality among the Georgian Orthodox Church, the four religious confessions and other religious entities. There is an avenue for challenging the above legislation to be challenged before the Constitutional Court of Georgia.

[127] *Idem.*

The Law of Georgia on Elimination of All Forms of Discrimination

The contents and the scopes of the Law

According to the Explanatory Report on the draft Law of Georgia on Elimination of All Forms of Discrimination (hereinafter the "draft Law")[128], one of the reasons for the adoption of the draft Law was the ineffectiveness of the existing legislation in terms of restoration of the infringed right and appropriate reparation to victims.[129] The draft Law, accordingly, aimed at creating "an efficient and effective mechanism which will actually enable the victims of discriminatory treatment to have their infringed right restored."[130]

The Law of Georgia on Elimination of All Forms of Discrimination (hereinafter the "Law", or the "Law of Georgia") does not create a new substantive right. This right is already declared and safeguarded by the Constitution of Georgia and those numerous international agreements that Georgia is a party to.[131] The Law defines discrimination, its categories and forms; and it provides a negative definition as to what must not be considered to be discrimination.The Law, accordingly, stipulates that the assessment of whether alleged differential treatment amounts to discrimination must be based on the Law concerned; the Law also lays down procedural rules to be used for the examination of discrimination claims.

In the light of the above features and objectives of the Law, it should be applied in parallel to Georgia's international agreements prohibiting discrimination and the Constitution of Georgia, as well as those other domestic acts substantive and procedural provisions of which either respectively prohibit discrimination or set forth the procedure for the examination of discrimination claims.

Article 1 of the Law

Article 1 explains the objective of the Law, which is to eliminate all forms of discrimination and establish equality. **Article 1** expressly refers to the positive obligations of the state to eradicate discrimination and ensure the equal realisation of the rights, guaranteed by domestic legislation, by individuals and legal entities. **Article 1 of the Law** adds the following protected grounds to the list provided for by **Article 14 of the Constitution:** age, citizenship, place of residence, belief, profession, marital status, state of health, disability, sexual orientation, gender identity and expression.

---

[128] The Law was adopted on 2 May 2014; in force since 7 May 2014.

[129] Explanatory Report on the Draft Law of Georgia on Elimination of All Forms of Discrimination, a.a).

[130] *Ibid.,* a.b).

[131] *Ibid.,* a.c).

Article 1 of the Law is an open-ended provision and implies other protected grounds not expressly mentioned therein. Therefore, when there is a reference in the text "to the protected ground provided for by Article 1 of the Law," those grounds which are not explicitly covered by **Article 1** are also implied.

In this context, the Explanatory Report on Protocol no. 12 to the European Convention, adopted by the Committee of Ministers of the Council of Europe, is noteworthy. When providing for the general prohibition of discrimination, **Article 1 of Protocol no. 12 to the Convention** did not add those protected grounds that were not expressly mentioned in **Article 14 of the Convention** but the significance of which has been recognised by the European Court of Human Rights. Instead, **Article 1 of Protocol no. 12** provides for the list of protected grounds identical to that of **Article 14 of the Convention**.

"This solution was considered preferable over others, such as expressly including certain additional non-discrimination grounds (for example, physical or mental disability, sexual orientation or age), not because of a lack of awareness that such grounds have become particularly important in today's societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted *a contrario* interpretations as regards discrimination based on grounds not so included."[132]

It is, therefore, imperative to point out that laying down the protected grounds in **Article 1 of the Law,** which are additional to **Article 14 of the Constitution**, in no way undermines the significance of other non-discrimination grounds that have been omitted by the legislature when enacting the Law.

Under Article 1 of the Law, the Law is aimed at ensuring equal exercise of the "rights set forth by the legislation of Georgia". Similarly, **Article 2.2 of the Law** prohibits direct discrimination with regard to the "rights established by the legislation of Georgia".

Under **Article 7.1 of the Law of Georgia on Normative Acts** adopted on 22 October 2009, the legislation of Georgia is made up by the legislative and sub-legislative normative acts of Georgia. The Constitutional Agreement of Georgia and the international agreements that Georgia is a party to are normative acts but they are

---

[132] Explanatory Report on Protocol no. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Committee of Ministers of the Council of Europe, on 26 June 2000, §§ 20, *vide*, http://conventions.coe.int/Treaty/en/Reports/Html/177.htm, [last visited 30.11.2014].

neither legislative, nor sub-legislative acts Therefore, they are not formally implied within "the legislation of Georgia". Accordingly, the Constitutional Agreement of Georgia is excluded from the scope of application of **Article 1** and **Article 2.2 of the Law**. Similarly, the aforementioned provisions of the Law do not cover those rights that are safeguarded by the numerous international agreements Georgia is a party to. It should be noted in this regard that the majority of international provisions that proclaim human rights and freedoms are self-executing and therefore there is usually no domestic normative act incorporating them within the national legal system.

Generally, the rights set forth in self-executing provisions of Georgia's international agreements can be invoked before the domestic courts, since these international instruments have become Georgia's normative acts as the result of ratification and accession. However, the reference to the "legislation of Georgia" in the Law at stake significantly delimits its scope of application and undermines general prohibition of discrimination provided by this Law.

In the light of the above observations, there is a need for a broader interpretation of the "legislation" to the end that the term implies the Constitutional Agreement and international agreements of Georgia. Another option is to amend the Law.

Broader interpretation of the Law and practical application by lawyers will be consistent with the case-law of the European Court on **Article 1 of Protocol no. 12 to the Convention**. The Court pointed out that this provision extends the scope of prohibition of discrimination not only with regard to "any right set forth by law," as the text of paragraph 1 might suggest, but beyond that.[133]

Significant information concerning the scope of application of **Article 1 of Protocol no. 12** is also given in the Explanatory Report of the Committee of Ministers of the Council of Europe. According to the document, the scope of protection of **Article 1 of Protocol no. 12** concerns four categories of cases, in particular where a person is discriminated against:

"i. in the enjoyment of any right specifically granted to an individual under national law;
ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);

[133] Savez crkava "Riječ života" and others v. Croatia, application no. 7798/08, judgment of the European Court of Human Rights of 9 December 2010, § 104.

iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot)."[134]

The Explanatory Report does not constitute an instrument providing an authoritative interpretation of the text of the Protocol although the European Court takes it into consideration.[135]

Furthermore, the European Court took due account of **paragraph 2 of Article 2 of Protocol no. 12**, prohibiting discrimination of a person by a public authority. The scope of application of **Article 1 of Protocol no. 12** is therefore extended to all four categories of cases listed in the Explanatory Report.[136]

Similarly, under **Article 3 of the Law**, "the requirements laid down in this Law shall apply to the acts of public authorities… in all spheres…" Therefore, the above four categories of cases in the Explanatory Report are relevant for the scope of application of the Law of Georgia at stake. ***The lawyers are accordingly recommended to invoke both the above case-law of the European Court and Explanatory Memorandum to Protocol no. 12.***

Broader interpretation and practical application by lawyers will as well be consistent with the position taken by the Human Rights Committee with regard to the scope of application of **Article 26 of the International Covenant on Civil and Political Rights**, providing for general prohibition of discrimination.[137]

Article 2 of the Law

Article 2 of the Law prohibits any discrimination (**paragraph 1**), including any acts aimed at forcing, inciting or aiding discrimination towards third persons (**paragraph 5**); gives a definition of direct, indirect and multiple discrimination (**paragraphs 2-4**); and gives a negative definition as to what should not be considered discrimination (**paragraphs 7-8**).

---

[134] Explanatory Report on Protocol no. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Committee of Ministers of the Council of Europe, on 26 June 2000, §§ 22, *vide,* http://conventions.coe.int/Treaty/en/Reports/Html/177.htm [last visited 16.11.2014].

[135] Savez crkava "Riječ života" and others v. Croatia, application no. 7798/08, judgment of the European Court of Human Rights of 9 December 2010, § 104.

[136] *Idem.*

[137] *Vide*, Broeks v. the Netherlands (No. 172/1984, ICCPR), Danning v. the Netherlands (No. 180/1984, ICCPR), Interights, *Non Discrimination in International Law*: *a handbook for practitioners*, 2011 edition, 27.

The provision of **Article 2.1 of the Law** which stipulates that any discrimination shall be prohibited in Georgia applies to the definitions given in the rest of the paragraphs of the Article and accordingly covers any discrimination in any form.

Article 2.2 of the Law defines direct discrimination and prohibits both discriminatory treatment and creation of discriminatory conditions by the state. The provision thus thoroughly covers those instances where due to the state's differential action or inaction a person may be placed in an unfavourable situation.[138]

Article 2.3 of the Law defines indirect discrimination as a situation wherein only the effects of treatment that differ and not the treatment itself. Such a definition of indirect discrimination is compatible with the case-law of the European Court.[139]

Apart from this aspect, there are significant discrepancies with the definitions of direct and indirect discrimination provided for in **Article 2.2** and **Article 2.3 of the Law**. It is recommended to redeem these discrepancies through respective legislative changes.

Both direct and indirect discrimination definitions in **Article 2.2** and **Article 2.3 of the Law** contain the same wording:

"…puts persons having any of the characteristics specified in **Article 1 of this Law** at a disadvantage compared with another person in a comparable situation, or equally treats persons who are in inherently unequal conditions…"

On the other hand, the case-law of the European Court of Human Rights and international law of human rights define direct discrimination as differential treatment of persons in analogous or relevantly similar situations and indirect discrimination as the similar treatment of persons in different situations.[140]

Since it is less likely to redeem this shortcoming of the Law by virtue of practical interpretation, it is recommended to amend the relevant provisions containing the definition of direct and indirect discrimination in order to bring the Law in compliance with the case-law of the European Court of Human Rights. The lawyers are recommended to use the standards discussed in the present guide until the legislative amendments are in force.

---

[138] In this regard, *vide, mutatis mutandis,* Pretty v. the United Kingdom, application no. 2346/02, judgment of the European Court of Human Rights of 29 April 2002, §§ 51-53.
[139] Handbook on European Non-Discrimination Law, Council of Europe, 2013, p. 29.
[140] *Ibid.,* pp. 22 and 29.

Furthermore, with regard to both direct and indirect discrimination, the Law repeats the same wording:

"Unless such treatment or creating such conditions [situation in the context of indirect discrimination] serves the statutory aim of maintaining public order and morals, has an objective and reasonable justification, and is necessary in a democratic society, and the means of achieving that aim are proportional."

This is the system of criteria based on which the competent authorities examine whether difference in treatment amounted to discrimination. This wording needs to be either amended or assume the appropriate implication through practical interpretation since it significantly differs from the respective system of criteria established by the European Court.

Under the established case-law of the European Court of Human Rights, "a difference of treatment is discriminatory if it "has no objective and reasonable justification," that is, if it does not pursue a "legitimate aim" or if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised"."[141] The European Court does not list legitimate aims in this definition and scrutinises the legitimacy of aims in each particular case.

One important shortcoming of the Law of Georgia is that a "statutory aim" is considerably different from a "legitimate aim" referred to by the European Court in the same context. A statutory aim is the aim defined by law, whereas a legitimate aim is the statutory aim which is in compliance with the Convention. A "statutory aim" referred to in the Law of Georgia meets the legality requirement in the sense that the aim of differential treatment must always have a basis in domestic law. However, a "statutory" aim fails to meet the lawfulness requirement which goes beyond the narrow scope of legality and implies the compatibility with the Convention.

As it is obvious from the above excerpt from the case-law of the European Court, "objective and reasonable justification" is interpreted in "other words" as implying the aspects of legitimate aim and proportionality.

In the case of the Law of Georgia, the Legislature uses the same collocation - "objective and reasonable justification," which is the European Court's phrase implying: 1) a legitimate aim, and 2) reasonable proportionality between the

[141] *Vide*, e.g., Lithgow and Others v. the United Kingdom), application nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, judgment of the European Court of Human Rights of 8 July 1986, § 177; Savez crkava "Riječ života" and others v. Croatia, application no. 7798/08, judgment of the European Court of Human Rights of 9 December 2010, § 86; D.H. and others v. the Czech Republic, application no. 13378/05, judgment of the Grand Chamber of the European Court of Human Rights of 29 April 2008, § 196.

interference and the aim sought to be realised. However, the Law before referring to this phrase names two statutory aims – public order and morals. It is obvious that the Legislature uses (rather inconsistently) the phraseology of the Court. However, it remains obscure whether a differential treatment may seek these two statutory aims only or these two aims are expressly mentioned in the Law only due to their prevailing importance and other statutory aims may also be implied under the "objective and reasonable justification".

The fact that the vague wording of the above provision makes room for broader interpretation of statutory aims and hence arbitrariness is further confirmed by Article 2.9 which introduces a new statutory aim – "an overwhelming state interest": "Differential treatment, creation of different conditions and/or situations shall be permissible if there is an overwhelming state interest and the necessity of state intervention in a democratic society." This provision actually lowers the standard, which is already low, of a statutory aim as it introduces the term which has traditionally been dangerous for human rights. It is not only a vague term but is not defined either in Article 2.9 or elsewhere; it is not requested by the Law that an "overwhelming state interest" should have some basis in domestic legislation.

It is recommended to amend the Law so that it exhaustively defines the aims justifying difference in treatment. It is recommended to define these aims as legitimate rather than statutory aims in order to enable competent authorities to examine the compatibility of the aim with the European Convention on Human Rights, i.e., its legitimacy.

It is recommended to move respective amendments into Article 2.2 and Article 2.3 of the Law of Georgia to the effect of incorporating the following wording established in the case-law of the European Court: "if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."

The lawyers are recommended to use the standards discussed in the present guide until the legislative amendments are in force.

Article 2.4 of the Law defines multiple discrimination which denotes discrimination on the account of two or more protected grounds. The following may serve as an example:

An employer does not promote a Muslim woman to a manager's position due to her religion and gender, as the employer thinks a Muslim woman cannot do a managerial job unlike an Orthodox Christian man or woman (multiple direct discrimination).

An employer requests all employees, including a nursing mother, who also has a disabled child, to work night shifts (multiple indirect discrimination).

Article 2.5 of the Law is mostly of declaratory character. It prohibits the acts aimed at forcing, inciting or aiding discrimination towards third persons. Such acts are already criminalised and penalised by the Criminal Code of Georgia.

Article 2.6 of the Law stipulates that "under the conditions provided for in this article, discrimination shall exist regardless of whether a person actually has any of the characteristics defined in Article 1, on the basis of which the person was discriminated against."

This provision should not be understood so that it is of secondary importance to point out a particular non-discrimination ground. To the contrary, the European Court has repeatedly held that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of **Article 14**.[142] The Constitutional Court of Georgia has the same approach in this regard.[143]

The above provision implies the cases of discrimination by association and discrimination by perception. In case of associative discrimination, the victim does not possess the non-discrimination ground.[144] In these cases, someone is discriminated against because they are associated with another person who possesses a protected ground.[145] In the case of *Weller v. Hungary,* e.g., the Court found children to be victims of discrimination as their biological father was not eligible for maternity allowance unlike adoptive fathers and male guardians.[146]

Another example of discrimination by association is when an employer treats differently and unfavourably an employee on the account of the political opinions of the latter, or when a student is dismissed from a university because his/her partner is transsexual.

---

[142] Carson and Others v. the United Kingdom, application no. 42184/05, judgment of the Grand Chamber of the European Court of Human Rights of 4 November 2008, § 61.

[143] Citizens – Jano Janelidze, Nino Uberi, Eleonora Lagvilava and Murtaz Todria v. the Parliament of Georgia, judgment no. 2/7/219 of the Constitutional Court of Georgia adopted on 7 November 2003, para. 1; Citizens of Georgia – Zaur Elashvili, Suliko Mashia, Rusudan Gogia and others and the Public Defender of Georgia v. the Parliament of Georgia, judgment no. 2/1-370,382,390,402,405 of the Constitutional Court of Georgia, adopted on 18 May 2007, para. II-36.

[144] Handbook on European Non-Discrimination Law, Council of Europe, 2013, p. 29.

[145] *Ibid.,* p. 47.

[146] Weller v. Hungary, application no. 44399/05, judgment of the European Court of Human Rights of 31 March 2009.

Discrimination by perception occurs when someone is discriminated against because others think that he/she possesses a non-discrimination ground; e.g., when an employer does not give a job to a woman thinking she is pregnant.

Article 2.7 of the Law concerns those special and temporary measures that are taken on the basis of non-discrimination grounds. Such measures of positive discrimination, or affirmative action, do not amount to discrimination as they are intended to favour and not to disadvantage individuals with protected grounds. According to the Explanatory Report on the Law, special reference to "gender, pregnancy, and maternity issues" is explained by the fact that "this principle is provided for by the Convention on the Elimination of All forms of Discrimination against Women".[147] **Article 2.7** also refers to disabled persons. The necessity to take such measures is certainly not limited to those spheres which the Legislature deemed had to be mentioned "especially".

Article 14 does not prohibit Contracting Parties from treating certain groups differently in order to correct "factual inequalities" between them. Indeed, in certain circumstances a failure to attempt to correct inequality through differential treatment may, without an objective and reasonable justification, give rise to a breach of that Article.[148]

Article 2.8 is *lex specialis* as it gives a negative definition of what must not be considered discrimination, namely, in the employment field. In particular, "any distinction, exclusion, or preference with respect to a particular job, activity, or sphere, based on its inherent requirements, shall not be considered discrimination."

The above provision is problematic in that it does not provide for an "objective and reasonable justification" for such a "distinction, exclusion, or preference;" in other words, **Article 2.8** neither presupposes the existence of a legitimate aim nor requests reasonable proportionality between the differential treatment and the aim sought. It is imperative that through either legislative amendment or practical interpretation, the provision contains the system of criteria for the assessment of a differential treatment in order to avoid any arbitrary "distinction, exclusion, or preference" in the employment field.

---

[147] Explanatory Report on the Draft Law of Georgia on Elimination of All Forms of Discrimination, a.c).

[148] Berger-Krall and others v. Slovenia, application no. 14717/04, judgment of the European Court of Human Rights of 12 June 2014, § 295.

Article 3 of the Law

Under Article 3 of the Law, "the requirements laid down in this Law shall apply to the acts of public authorities, organisations, and to the acts of natural and legal persons in all spheres, unless these acts are not governed by other legal acts, which are in conformity with the provisions of **Article 2.2** and **Article 2.3.**

Since **Article 2.2** and **Article 2.3 of the Law** contain the definition of direct and indirect discrimination, it is unclear what is implied in the conformity of legal acts with the definition.

In case **Article 3 of the Law** implies that a legal act may allow differential treatment or situation which is not discrimination, then the reference should as well be made to other relevant subparagraphs of the Law providing for negative definition of discrimination. In terms of legislative technique, it is recommended to amend **Article 3 of the Law** so that it reads as follows: "the requirements laid down in this Law shall apply to the acts of public authorities, organisations, and to the acts of natural and legal persons in all spheres."

Lawyers are recommended to apply Article 3 of the Law within the above meaning until legislative amendments are in force.

Article 4 of the Law

Article 4 of the Law lays down the obligation of every institution to eradicate discrimination and is undoubtedly a positive provision. Under **Article 6 of the Law**, the Public Defender of Georgia monitors the fulfilment of this obligation.

Article 5 of the Law

Under **Article 5.1 of the Law,** "no provision of this Law may be interpreted as restricting the rights of religious associations derived from freedom of religion (including the right to religious worship), provided that the exercise of those rights does not violate public order, public safety, or the rights of other persons."

The above provision, with the present wording, actually implies the statutory hierarchy between the rights derived from the freedom of religion *vis-à-vis* any other right, including the right to equality set forth by the European Convention on Human Rights and the Constitution of Georgia. The right to freedom of religion is an important safeguard in the catalogue of rights and freedoms; however, it is not an absolute right. Accordingly, when the right to freedom of religion comes in conflict with other non-absolute rights, the priority between

them is decided based on the particular facts of the case and not the hierarchy of the rights. **Article 5.1 of the Law** does not contain the system of criteria for the assessment of interference in the right to freedom of religion (legal basis, the legitimate aim sought by the interference, and the necessity of interference in a democratic society) and therefore cannot be used for striking a fair balance between rights. **Article 5.1 of the Law** is not in conformity with the case-law of the European Court and it is recommended to delete it which can be achieved through constitutional proceedings.

It is recommended to apply **Article 5.2 of the Law** to the effect that the provisions of the Law are construed in the light of the European Convention and its case-law. The European Convention is the most authoritative instrument in the field of prohibition of discrimination. It is also significant that neither the Constitution of Georgia, nor the Constitutional Agreement between the State and the Apostolic Autocephalous Orthodox Church of Georgia is immune from the scrutiny of the European Court if there is an application against Georgia alleging the violation of a Convention right based on either act.[149] With regards to the hierarchy of normative acts established by domestic legislation, while the Law of Georgia on the Elimination of All forms of Discrimination is below both the Constitution and the Constitutional Agreement, it may not come in conflict with those acts as it does not set forth a new substantive right. The Law "is aimed at ensuring equal realisation of the rights already protected under the legislation."[150] Therefore, the Law should be used for ensuring equal exercise of the rights guaranteed by the Constitution of Georgia and other normative acts.

Articles 6-9 and 11-12 of the Law

Articles 6-9 and Articles 11-12of the Law specify the duties and authorities of the Public Defender in terms of the prohibition of discrimination and lay down guiding provisions along with the Organic Law of Georgia on the Public Defender of Georgia. The latter was amended on 2 May 2014.[151]

Article 10 of the Law

[149] *Vide*, concerning the violation of the Convention right on the account of application of a constitutional provision: Aziz v. Cyprus, application no. 69949/01, judgment of the European Court of Human Rights of 22 June 2004; Sejdic and Finci v. Bosnia and Herzegovina, application nos. 27996/06, 34836/06, judgment of the Grand Chamber of the European Court of Human Rights.

[150] Explanatory Report on the Draft Law of Georgia On Elimination of All Forms of Discrimination, a.c).

[151] *Vide,* new wording of Articles 3.1^1, $3^1.4$, $3^1.5$, 14^1, 20^1 of the Organic Law.

Article 10 of the Law sets forth a person's right to apply to a court against a person/institution which allegedly discriminated against the person concerned and request the compensation of non-pecuniary and/or pecuniary damages. The procedure is laid down in the Civil Procedure Code of Georgia.

Jurisprudence of the Courts of General Jurisdiction

Burden of proof

The excerpts below demonstrate the standards of proof used by the Courts of General Jurisdiction when examining the facts of alleged discrimination in civil, administrative, and criminal proceedings.

Civil law

1.

Claimant M.Kh. argued before Tbilisi City Court that Permits Department of Tbilisi Architecture Office functioning under the management of Tbilisi City Hall dismissed her for offering a different opinion. The claimant adduced the minutes of the board meetings held at Tbilisi Architecture Office as the evidence of discriminatory dismissal from office. At the meetings, the claimant had expressed a different opinion concerning one of the reconstruction projects undergoing in Tbilisi.[152]

In its judgment of 12 August 2009, the Section of Civil Cases of Tbilisi City Court found that the claimant expressed a different opinion concerning the project on 27 November 2008. On 14 February 2009, the claimant and the head of the respondent office had a telephone conversation. After two days, the employer requested the claimant to submit a letter of resignation and later, because the claimant did not resign, dismissed her under Article 38 of the Labour Code of Georgia.[153]

When reaching the above finding, Tbilisi City Court relied on the explanations of the claimant as an eyewitness to these events and the failure of the respondent to refute these allegations (e.g., by adducing statements of witnesses).[154]

Tbilisi City Court observed that in labour relations, when an employee alleges discriminatory treatment and points out specific evidence as an eyewitness, the employer is obliged to establish that the evidence indicated by the claimant are not accurate. Based on this, Tbilisi City Court found that M.Kh. was a victim of discriminatory dismissal from office on the account of her expression of a different opinion on the project.[155]

---

[152] Judgment of the Section of Civil Cases of Tbilisi City Court, 12 August 2009.
[153] *Idem.*
[154] *Idem.*
[155] *Idem.*

The Court of Appeal did not agree with Tbilisi City Court concerning discriminatory treatment towards the appellant.[156] The Court of Appeal observed that although M.Kh.'s different opinion concerning the project was registered in the minutes of 27 November 2008, she continued with her appointment in the Permits Department of Tbilisi Architecture Office.[157]

The Supreme Court however did not shift the burden to the respondent; according to the Court, the appellant failed to establish *prima facie* differential treatment. The Supreme Court observed that although it was evident from the minutes of the board meeting that M.Kh. did criticise the project, however, according to the same minutes, the claimant was not in the minority. Every participant of the board meeting was against the proposed project and eventually the project was turned down by the board decision. The Supreme Court found that the claimant failed to prove the telephone conversation between her and the head of the respondent office. There was no other evidence adduced by the claimant regarding discriminatory treatment.[158]

As a result, the Supreme Court held that the case material did not prove the causal relation between the claimant's opinions and her dismissal by the respondent. Therefore, there was no ground for non-pecuniary damage since this damage was attributed by the claimant to the breach of her non-pecuniary rights as the result of discriminatory dismissal from office.[159]

2.

On 18 August 2010, N.T. lodged a claim with Tbilisi City Court against S.S. and requested to declare the dismissal order against him as null and void, restore him to his position and compensate for the damages he suffered. According to the claimant, he had worked at SS Tbilisi Registration Office at various positions since 7 November 2006. He was constantly subjected to discrimination on account of his political views. Moreover, N.T. was not paid for overtime while other employees were paid for overtime. Finally, on 29 October 2008, N.T. was illegally dismissed from his position.[160]

The respondent did not uphold the claim and explained that the labour relation with the claimant was discontinued based on Article 37.d) of the Labour Code of Georgia, i.e., through discontinuation of the labour contract. According to the

---

[156] Decision of the Chamber of Civil Cases of Tbilisi Court of Appeal, 12 November 2009.
[157] *Idem.*
[158] Decision no. AS-549-517-2010 of the Chamber of Civil Cases of the Supreme Court of Georgia.
[159] *Idem.*
[160] Decision no. AS-519-493-2011 of the Chamber of Civil Cases of the Supreme Court of Georgia, 24 June 2011.

respondent, the Labour Code of Georgia allows discontinuation of a labour contract without giving any reasons within the discretionary power of the employer.

The Court of Cassation did not uphold the reasoning of the Court of Appeal on this case. According to the latter, labour relations discontinue due to the cancellation of a labour contract and the law does not limit this initiative of parties on such cancellation with any additional precondition, that is, either party's desire for the cancellation of a labour contract is sufficient for the discontinuation of labour relation between the employer and employee.

The Court of Cassation instead observed that although a party's initiative (including unilateral initiative) to cancel a labour contract is generally sufficient for the discontinuation of a labour relation, this, however, should not be understood as implying the absence of employer obligations. The expression of initiative to discontinue labour relations must not entail the violation of an individual's basic rights and general principles of law. Every civil right is delimited with the preconditions of lawfulness for its realisation.

The Court of cassation further opined that when an employer wishes to discontinue labour relation, the basic rights and freedoms guaranteed by the Constitution of Georgia, as well as prohibition of discrimination set forth by the Labour Code must be respected in the process. Under Article 2.6 of the Labour Code, the parties to labour relations must respect fundamental human rights and freedoms set forth by law; Article 2.3 and Article 2.4 of the Labour Code prohibit any discrimination in labour relations on account of race, skin colour, language, ethnic and social affiliation, nationality, origin, property or social status, place of residence, age, sex, sexual orientation, disability, affiliation with religious or other association, marital status, and political or other opinion. According to the Court of Cassation, it is considered to be discriminatory to directly or indirectly oppress an individual with the purpose of creating an intimidating, hostile, humiliating, degrading or offensive environment and/or to create such an environment which directly or indirectly places a person in a disadvantageous position vis-à-vis those in an analogous situation.

The Court further observed that it is mandatory to examine whether a dismissal from office was discriminatory on the account of one or more grounds protected by Article 2 of the Labour Code. Burden of proof in such cases rests with the employer, which means if an employee alleges that his/her dismissal is discriminatory, the employer must prove the lawfulness of the expression of initiative and non-existence of a discriminatory ground for dismissal. In case of failure to prove otherwise, the dismissal must be considered to be illegal.

With regard to labour disputes the decision of 20 May 2011, adopted by the Chamber of Civil Cases of Tbilisi Court of Appeal, is significant. In this case, on 28 December 2009, labour relation was discontinued between S.P. and her employer on the basis of Article 37.1.d) and Article 38 of the Labour Code, with the initiative of the employer. According to the claimant, the dismissal was discriminatory on the account of her marital status. The claimant alleged that she was dismissed from the office because she was married to N.Gh. with whom her employer had personal disagreement and an altercation.

The Court of Appeal held that discriminatory dismissal on the account of marital status could not be established by the case materials and that the claimant's allegation was ill-founded.

The Court of Appeal observed that the gist of discrimination on the account of marital status is differential treatment based on whether an individual is in or not in a registered marriage. It was established that the claimant copied the company clients' files and took a company laptop to her home without permission. These events that took place within the days after the claimant's husband founded a competitor firm which gave rise to a reasonable suspicion that S.P. was acting in the interests of a rival company. The dismissal was grounded on the above facts and could not be considered to be discriminatory.

Administrative law

1.

On 2 October 2000, several individuals who are Jehovah's Witnesses lodged a claim with Kutaisi City Court. The respondents are the Ministry of Internal Affairs of Georgia, Chief of Police of Kutaisi, Deputy Chief of Police of Kutaisi and officers of Kutaisi Police.

The claimants requested the Court to oblige the respondents to issue an apology for their attacks on Jehovah's Witnesses and to prohibit such harassment in future. The claimants further requested compensation for pecuniary and non-pecuniary damages and disciplinary penalties to be imposed on all those officers who participated in the assault.[161]

In particular, the claimants alleged that they, as Jehovah's Witnesses, were subjected to physical and verbal assault by police in Kutaisi. The policemen took away and destroyed their religious literature and threatened to throw them in

[161] Judgment of Kutaisi City Court of 7 June 2002.

Rioni if they saw them in the street again.[162]

Kutaisi City Court did not uphold the claim on the ground that the claimants should have applied to the prosecutor's office and report their allegations on the commission of the crime, after which the Court would decide on the criminal responsibility of the officers after the due inquiry into the allegations and investigation of the case. The claimants had not applied to the prosecutor's office.[163]

The Court found that the allegations of the claimants were not sufficient in order to uphold their claim. The witnesses who were heard before the City Court were not eyewitnesses and they submitted hearsay as the only evidence. The Court also observed that the claimants could not prove before the Court that their religious literature was torn and that they sustained bodily injuries. The claimants had not undergone medical examination and could not therefore adduce any medical reports. Kutaisi City Court dismissed the claim as ill-founded.[164]

The Court of Appeal observed that there was no evidence in the case-file corroborating the claimants' allegations. Ordinance no. 240 issued by the President of Georgia on 17 May 2001 on investigating and court examination of incidents of violence against religious minorities that was adduced by the claimants as evidence was not admitted as such by the Court. The Court of Appeal held that the facts of violation alleged by the claimants were not established and rejected the appeal.[165]

The claimants appealed in the Supreme Court and observed that the first instance court violated the law by obliging them to produce evidence of the illegal actions of the police and medical examination reports. According to the claimants, they requested Kutaisi City Court not to establish the commission of a crime but an act that degraded their dignity. They based their claim on Article 1005 of the Civil Code of Georgia since the illegality of the police actions is prohibited not only by the Criminal Code but also by the Constitution, the European Convention on Human Rights and the Law of Georgia on Police.[166]

The Court of Cassation drew the claimants' attention to Article 102.3 of the Civil Code of Georgia, under which the allegations that must be established by certain evidence cannot be established by other evidence. In accordance with this statutory requirement, the Supreme Court Chamber observed that it was not in

---

[162] *Idem.*

[163] *Idem.*

[164] *Idem.*

[165] Decision of the Appeal Chamber of Administrative and Taxation Cases of Kutaisi Regional Court, 18 December 2002.

[166] Decision no. 3G/AD-98-3-03 of the Supreme Court of Georgia, 17 October 2003.

the position to uphold the claim as it would amount to establishing the fact that underlined the claim and that the facts at stake could not be established by the evidence adduced by the claimants. In particular, the claimants' request to oblige the respondents to issue an apology for assaulting them based only on their own submissions and the word of mouth testimony of the above witnesses was rejected by the Court since the alleged assault constituted a criminal offence and had to be established by a final judgment of a court. Otherwise, if the Court had deemed that the incident of assault was established and obliged the respondents to issue an apology, it would have amounted to the establishment of criminal guilt in administrative proceedings which is contrary to law.

The Court also extended its observations to the second request of the claimants to oblige the police to take upon an immediate public undertaking to carry out their official duties and protect Jehovah's Witnesses from any attacks in the future.

Based on the above reasons, the Supreme Court found that the claim for pecuniary and non-pecuniary damage was ill-founded; the violation of the official duties by police had to be established in the relevant proceedings after which the Court would be in the position to examine the claim and decide on it.

Criminal law

1.

I.J., G.Kh., Z.A., and G.M. were charged with the persecution of a person by resorting to violence or threats of violence on account of his or her political activity, under Article 156.2.a) of the Criminal Code of Georgia. It was alleged that on 13 January 2012, the accused persecuted Z.B. and A.M. resorting to violence on the account of their political slogans.[167]

The Court heard at the pre-trial hearing the observations submitted by the parties to the proceedings, studied the adduced evidence and was satisfied that **there was a high probability** that V.S. would be found guilty. At the same hearing, the accused admitted the commission of the crime and the defence did not question the evidence adduced by the prosecution.

The trial Court observed that under Article 73 of the Criminal Procedure Code, during a trial, any fact agreed upon by parties to the proceedings will be admitted as evidence without its examination. The Court studied all the evidence adduced in terms of their relevance, admissibility, reliability and sufficiency and found that

[167] Judgment no. 1/6-13 of Kutaisi City Court, 27 March 2013.

their entity proved beyond the **reasonable doubt** that the accused were guilty as charged.

2.

V.S. was charged with **violent persecution of an individual on the account of his/or her belief** under Article 156.2.a) of the Criminal Code of Georgia. In particular, on 15 January 2014, V.S. allegedly assaulted physically and verbally two Jehovah's Witnesses on the account of their belief.[168]

At the pre-trial hearing, the Court heard the observations submitted by the prosecution and the defence, studied the adduced evidence and was satisfied that **there was a high probability** that V.S. would be found guilty.

During the trial, V.S. admitted the commission of the crime and stated that he sincerely repented it.

The Court observed that under Article 73 of the Criminal Procedure Code, during a trial, any fact agreed upon by parties to the proceedings will be admitted without its examination as evidence. Therefore, the fact that V.S. committed the crime was established beyond a reasonable doubt by the body of reliable and consistent evidence, *viz.*, statements of the victim and witnesses; statement of identification; V.S.'s confession and other evidence.

Comparator groups

The arguments about differential and unfavourable treatment of a person vis-à-vis those in analogous or relevantly similar situation are rarely raised before the Courts of General Jurisdiction of Georgia. When claimants do attempt to adduce those arguments their reasoning is mostly wrong.

A claimant alleged before the Chamber of Civil Cases of the Supreme Court of Georgia that her dismissal from office was discriminatory as she was treated differently from her colleagues who were in an analogous situation.[169] The claimant referred to the following example of differential and unfavourable treatment as the "main ground for her discrimination claim:" when the claimant's employer held a meeting, all employees were summoned to the meeting except for the claimant. The claimant alleged in her cassation appeal lodged with the Supreme Court that the lower courts failed to take into account one of the most

[168] Judgment no. 1/157-14 of Kutaisi City Court, 1 April 2014.
[169] Decision no. AS-1298-1318-2011 of the Chamber of Civil Cases of the Supreme Court of Georgia, 7 November 2011.

important aspects of discriminatory treatment – differential and unfavourable treatment vis-à-vis other employees. The claimant's colleagues were summoned for the meeting in advance but she was purposefully overlooked by the employer and was thus placed in an unequal situation compared to other employees. "This fact indicates nothing other than a classical example of employer's discriminatory and unequal treatment of an employee" – alleged the claimant before the Supreme Court.

The Chamber of Civil Cases of the Supreme Court did not admit the claim for the consideration of merits.[170]

[170] *Idem.*

Conclusion

The present guide is a practical manual to be used by lawyers arguing discrimination cases before the courts of general jurisdiction and the Constitutional Court of Georgia.

The guide discusses the landmark judgments of the Constitutional Court that defined the contents and scopes of Article 14 of the Constitution of Georgia. Furthermore, those aspects are highlighted where the jurisprudence of the Constitutional Court presumably diverges from the standards established by the European Court of Human Rights; lawyers are, accordingly, given concrete practical recommendations to motion for the change of the jurisprudence through constitutional proceedings. The arguments for the change are based on the European standards. While the Constitutional Court of Georgia is formally bound only by the Constitution (and under the domestic legislation, ECHR is below the Constitution), stemming from the universal theory of human rights, the court should take into consideration the European Convention on Human Rights and the authoritative case-law of the European Court.

The guide explains in details the provisions of the Law of Georgia on Elimination of All Forms of Discrimination in the prism of the European standards of human rights. Lawyers are given concrete recommendations how to apply these standards in their practice.

Finally, the guide identifies number of provisions that necessitate legislative changes. Lawyers are recommended to apply the relevant case-law of the European Court until the legislative amendments, and to defend the interests of their clients based on these standards; alternatively, the guide provides particular arguments for challenging before the Constitutional Court those provisions based on which alleged discriminatory treatment took place.

Author: Ms. Nana Mchedlidze