

MARRIAGE, THE RIGHT TO MARRY, AND THE CONSTITUTION OF GEORGIA

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Abstract. With its profound meaning, marriage is one of the oldest social constructs, predating the formation of the state and even the law. Despite its growing importance, states have not defined marriage within the framework of fundamental law. As a result, the legal aspects of marriage have undergone significant changes, and it is only recently that marriage has come under the jurisdiction of the state. As a rule, marriage and related issues are part of civil legislation; they may be provided for in both the Unified Civil Code and the Special Family Code. The article discusses the Georgian experience with the constitutionalisation of marriage and the evolution of the constitutional regulation of marriage in the Democratic Republic of Georgia.

Keywords: marriage; European Convention; Constitution of Georgia; constitutionalisation

INTRODUCTION

With its profound significance, marriage is one of the oldest social constructs, predating the formation of the state and even the law [Wardle 2007, 1370]. In relation to marriage, the state should be prudent since any arbitrary interference with personal freedom and space might lead to severe and critical consequences. It is the primary, central family law institution [Herring 2009, 37], consisting of economic and legal “rights, benefits, and obligations” [Eskridge 1996, 70; Kristen 1999, 104-105].

Marriage and other institutions fell under the jurisdiction of the state at a recent stage of history, and there was a rationale behind this. Despite its growing importance, states did not define marriage within the framework of basic law. Along with this development, marriage-related legal challenges have evolved. Over time, the increase in support for same-sex marriages

has gained momentum [Wardle 2007, 1368]. The states have also developed different approaches toward this issue; therefore, the eligibility criteria for marriage and a person's right to marry fall outside the purview of this research, as this necessitates an entirely different study. The primary objective of the study is to examine the essentiality of marriage within the framework of legal institution and constitutional regulation, as well as delves into the constitutional understanding of marriage. The analysis is situated in the context of the functional objectives of the constitution, with a little infusion of political ideas.

Continental European family law states are distinguished by the codification of the legal norms governing family law institutions. As a general rule, marriage and related issues are part of civil legislation; they can be provided in both the unified civil law code and the specialized family law code or statute. Many states have expanded the concept of marriage to include not only heterosexuals but also cohabiting homosexual couples who have legal and factual relationships. Nowadays, an increasing number of Western European states offer some form of partnership for homosexual couples while some other states legalize equal right to marry [Casto 2005, 278]. This is entirely an issue of people and society's preferences, choices, and priorities; however, one thing is certain: from legal perspective, it is essential to incorporate the key elements of legal regulation pertaining to marriage as a civil institution within the legislative framework and the rest is a legal technique.

The article discusses the Georgian experience with marriage constitutionalization and the evolution of constitutional regulation of marriage in the Democratic Republic of Georgia from a traditional to a contemporary and more inclusive legal framework.

1. EUROPEAN COURT OF HUMAN RIGHTS AND RIGHT TO MARRY

1.1. Article 8 of the European Convention and Right to Marry

The European Convention on Human Rights (ECHR) was adopted in the wake of World War II to protect individuals and ensure that tragic history does not repeat itself. The Convention incorporates essential political and civil rights,¹ and the right to marry is prominent alongside other fundamental rights.² The conventional right to marry is believed to be inspired by Article 16 of the Universal Declaration on Human Rights (UDHR), which

¹ See: European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

² Ibid. Article 12.

allows men and women of marriageable age to marry.³ By adopting this provision, the international community intended to prevent the widespread propaganda against interracial and same-sex marriages while also tackling child and forced marriage that was primarily contributing to the stigmatization of females. In addition to the reference to “women and men” as possessors of the right to marry, the prevailing inequality was addressed by the explicit reference to equality in every phase of marriage, including divorce [Van der Sloot 2014, 2-3]. Furthermore, it placed substantial attention on marriage and family as two independent rights, thus protecting the stigmatization of children born out of wedlock [Morsink 1999, 241]. Considering the various legal, religious, and cultural backgrounds of signatory states to the Convention, the legal landscape in marriage-related matters significantly differs [Spano 2014, 495]. This is the reason why the Universal Declaration on Human Rights explicitly mentioned that no one should be deprived of the right to marry due to characteristics such as race, religion, and nationality [Brueggemann and Newman 1998, 56]. On the other hand, the European Convention opted not to explicitly refer to specific grounds for discrimination, as it could lead to speculation in the future and the establishment of a hierarchy among discriminatory grounds. Moreover, Article 14 of the ECHR ensures the ability of people to enjoy their Conventional rights and freedoms without discrimination.

The institution of Marriage was perceived by the Commission and later by European Court of Human Rights (ECtHR) as union of one man and one woman. Their earliest rulings strengthen the conservative views on “family” and “marriage”.⁴ This was explained by the fact, that during the adoption of the Convention, no signatory states’ domestic law provided an opportunity for an equal right to marry, implicitly or explicitly, marriage was a heteronormative institution that sought to strengthen the so-called traditional family values; Considering the various legal, cultural or religious backgrounds of Council of Europe Member states, the ECtHR stated that marriage does not fall within the ambit of Article 9 ECHR. The court was clear in stating that marriage is not a form of expression of religion, thought, or conscience,⁵ and it has no religious origins, marriage was created for alliances and not for religion [Abrams and Brooks 2009, 6-7]. By omitting the religious element from the legal institution of marriage, the Universal Declaration on Human Rights and the European Convention on Human Rights affirmed the idea of the family and a person preceding the state and society.

³ The Universal Declaration of Human Rights, 10 December 1948, Article 16.

⁴ *Sheffield and Horsham v. The United Kingdom* [ECtHR], App. nos. 31-32/1997/815-816/1018-1019, 30 July 1998, paras. 66-67.

⁵ *X v. Federal Republic of Germany* [ECHR], App. no. 6167/73, 18 December 1974.

The discussions over marriage and marital status started with Article 8 ECHR as it paved the way for future developments on the marital status of homosexual couples. The commission interpreted Article 8 beyond its traditional frame and stated that the prohibition of male intimacy is an unjustifiable interference in a person's private life.⁶ In the commission's view, even if such relationships fall within the realm of private life, they are beyond the protection of family life. During the first stage of development, the commission did not consider the legal situation of heterosexual couples to be comparable to that of homosexual couples [Shahid 2023, 399-400]. Although both the commission and the court found it very difficult to define the essence of Article 8 ECHR, it was evident that the journey to recognition of marriage as right to all adult individuals hinged on the recognition of homosexual relationships within the ambit of family life. Thus, the necessity to abandon the so-called traditional views on "family" and "marriage" was inevitable.

Over the past decade, the ECtHR has been on its journey to marriage equality. However, it has never found enough courage to affirm marriage as a human right of all individuals. Article 12 of ECHR ensures that all "women and men" of marriageable age have the right to marry and found a family. In the 1980s, the court was of opinion that Article 12 was intended to protect family through traditional marriage – a union of one biologically female and one biologically male.⁷ The court's reasoning was based on the explicit reference to 'women and men' and the historical context in which the European Convention was adopted. Although the historic background proves that marriage in the 1950s was understood as a heteronormative institution,⁸ the Convention did not explicitly forbid homosexual marriages. The attempt to apply the historic and teleological reading of conventional rights caused confusion and contradictions in ECtHR's future case law [Shahid 2017, 186, 189].

The human rights protection is commonly considered as a standard that applies to all humans equally; however, in practice, the protection provided by the constitution is often based on more than one legal standard. The court's alternative approach to implementing the equal protection clause is essentially linked to personal characteristics [Gerstmann 2004, 13]. While it is true that states' diverse cultural, religious, and legal aspects have significantly influenced the essence of marriage in domestic legislations, on regional level, under the umbrella of Conventional protection, it creates inconsistent practices. While some states' legislation ensures right to marry exclusively for heterosexual couples, others support the more liberal

⁶ See: *Dudgeon v. The United Kingdom* [ECtHR], App. no. 7525/76, 22 October 1981.

⁷ *Rees v. The United Kingdom* [ECtHR], App. no. 9532/81, 17 October 1986, par. 49.

⁸ *Schalk and Kopf v. Austria* [ECtHR], App. no. 30141/04, June 24 2010, par. 55.

understanding of marriage, particularly the union of two adults coming together to establish terms upon which they agree to share lives. Considering, on the one hand, the states' collective endorsement of constructing a society in which everyone's rights and freedoms are respected, as well as the core values the convention aspires to protect, on the other hand, the states are responsible for enacting more human rights and dignity-centered regulations [McCrudden 2008, 692]. The grey zones in Conventional protection push the Conventional right to marry to strike a balance between factual and fictional, biological, and legal, traditional, and evolutionary definitions. As a result, the marital status is being entirely entrusted to domestic authorities and for these reasons, the domestic authorities are empowered to regulate marriage-related procedures. Even at this stage, the ECtHR accepted that the institution of marriage has undergone changes;⁹ these changes, of course, are related to humans, their choices, and their preferences. Thus, by referring to the convention as a living instrument,¹⁰ it seems court acknowledges the global shift toward unchaining marriage from the hands of states and their political decisions.

1.2. States Margin of Appreciation and Right to Marry

Article 12 of the ECHR, unlike other conventional rights, does not include any grounds or circumstances that allow the state to intervene.¹¹ Article 12 is not an absolute right, and it delegated power to states' to regulate marriage-related procedures. In the ECtHR view, national governments are in a better position to assess and evaluate the needs of their own communities and, thus, are better equipped to make the most difficult decisions involving political and social matters¹² [Gerards 2018, 488]. In order to ensure states discretion in deciding who, when, and under what conditions an individual can solemnize marriage [Shahid 2023, 399], the court grants states' margins of appreciation. Depending on the rights at stake, the scope of the margin of appreciation varies. If the ECtHR deems the issue at hand requires careful evaluation, the state's margin of appreciation can be narrowed¹³ [Gerards 2018, 502-503]. In circumstances where the court was of the opinion that the interpretation of marriage is strongly affected by cultural aspects and therefore varies from one country to another,¹⁴ the court concluded that states' margins of appreciation are wide. Furthermore, where

⁹ Christine Goodwin v. The United Kingdom, [ECtHR], App. no. 28957/95, 11 July 2002 par. 100.

¹⁰ Tyrer v. United Kingdom [ECtHR], App. No. 5856/72, 25 April 1978, par. 31.

¹¹ Frasik v. Poland [ECtHR], App. no. 22933/02, 5 January 2010, par. 90.

¹² Schalk and Kopf v. Austria [ECtHR], App. no. 30141/04, June 24 2010, par. 98.

¹³ See: Pretty v. The United Kingdom [ECtHR], App. No. 2346/02, 29 July 2002, par. 71.

¹⁴ F. v. Switzerland [ECtHR], App. no. 11329/85, 18 December 1987, par. 33.

the case raised ‘sensitive, moral, or ethical’¹⁵ issues, especially in the absence of European consensus, states were granted wide autonomy [Shahid 2017, 189, 193]. The European Consensus aims at demonstrating that a particular practice gains a certain measure of uniformity [ibid., 185]. Therefore, in the context of Article 12, by referring to the absence of such consensus, ECtHR is willing to show that the contracting states are not yet ready to unchain marriage from its “traditional” framework. While the court’s interpretation of Article 12 regarding homosexual marriages is rather restrictive and the state enjoys wide autonomy, in other marriage-related cases, the ECtHR ruled against the respondent, concluding that if a state prevents a prisoner from marrying a former partner, even if he raped her, it constitutes an infringement of the right to marry¹⁶ [Johnson and Falcetta 2020, 92]. Although the ECtHR is reluctant to narrow a state’s margin of appreciation in marriage equality cases, the court has called on a respondent state to cease enforcing legal provisions supporting “traditional” forms of marriage and family [ibid., 91]. Moreover, the ECtHR ruled against the respondent by stating that the state exceeded its margin of appreciation when it failed to provide a specific legal framework to ensure comprehensive protection of homosexual relationships.¹⁷ However, in the case where homosexual couples argued that the heteronormative nature of marriage was in breach of their conventional rights, the court relied on the state’s margin of appreciation and concluded that states are not forced to change domestic legislation and include homosexuals within the right to marry.¹⁸

2. INCORPORATING MARRIAGE IN THE CONSTITUTIONS

The modern era has seen a significant decline in the demand for citizen’s discipline; therefore, the degree of state supervision of marriage and family also decreased [Maclean 2005, 29]. Some states define marriage at the constitutional level. If marriage is subject to constitutional lawmaking, it will necessarily mean that the issues related to marriage are regulated by special legislation [Dalby 2001, 2].

State constitutions regarding the issue of marriage can be divided into several categories. Constitutions that fall into the first category do not address the issue of marriage, and this subset of basic laws constitutes the most extensive group. In some constitutions, whether explicitly or implicitly,

¹⁵ *Hämäläinen v. Finland* [ECtHR], App. no. 37359/09, 16 July 2014, par. 67.

¹⁶ *Frasik v. Poland* [ECtHR], App. no. 22933/02, 5 January 2010, par. 100.

¹⁷ *Oliari and Others v. Italy* [ECtHR], App. nos.18766/11 and 36030/11, 21 October 2015, par. 185.

¹⁸ *Fedotova and Others v. Russia* [ECtHR], App. nos. 40792/10, 30538/14 and 43439/14, 17 January 2023, par. 34.

the concept of marriage is defined as the union between one man and one woman [Gegenava 2020, 126-27].

The reasons marriage should be incorporated in the constitution or even mentioned vary across the world. If, in some places, this is related to fundamentalism and religiosity of the people, in others, it is an encouragement of discriminatory treatment or unhealthy politics, which is justified by the voters' sentiments and the political choices of the state. Additionally, there is collective fear and aggression toward changes in the conventional idea of marriage, innovations, and alternative types of partnership. The religion and customs of a specific geographical area have a significant impact on public perception of the relationships between homosexual partners [Olson, Cadge, and Harrison 2006, 342-43].

In a religious society like the United States, religious beliefs play an essential role in shaping opinions on marriage [ibid., 355]. The House of Representatives and the Senate have voiced their voices on the nature of marriage, either jointly or separately, including through resolutions that have strictly defined marriage as a relationship between persons of the opposite sex – a man and a woman.¹⁹ Nevertheless, the Supreme Court soon reversed this approach and recognized marriage equality.²⁰ This demonstrates the quick shift in political, social, and legal preferences. Furthermore, it emphasizes an essential justification for the claim that states' fundamental laws should not regulate marriage. Indeed, by the constitutional regulation of marriage, nothing changes because it does not guarantee the permanence and stability of marriage, especially given the current political landscape in which constitution changes more frequently than laws.

3. MARRIAGE IN THE CONSTITUTION OF GEORGIA: FROM THE DEMOCRATIC REPUBLIC TO THE MODERN CONSTITUTION

Historically, family law matters in Georgia remained under the jurisdiction of the church and states rarely intervened in these relationships. Marriage includes religious and legal implications and the church regulated marriage registration, like many other legal matters [Gegenava 2018, 150-51].

The secular policies of the Democratic Republic of Georgia significantly changed the social function of the church [Gegenava 2013, 179-81], and unsurprisingly, no one would give the church authority over civil act registration. As a result of state activism, on December 3, 1920, the "Law on the Registration of Civil Status Acts" was adopted, establishing the state's exclusive, comprehensive institutional authority over marriage.

¹⁹ H.R.J. Res. 56, 108th Cong., 1st sess. (2003); S.J. Res. 30, 108th Cong., 2nd sess. (2004).

²⁰ Obergefell v. Hodges, 576 U.S. 644 (2015).

In the 1921 Constitution, marriage was included in the category of fundamental rights. Article 40 of the Constitution of the Democratic Republic of Georgia established that “marriage is based on “equality of rights and the free will”²¹ thus, emphasis was placed not on the institution of marriage but rather on the legal status of married individuals and the voluntary nature of marriage. For this reason, it is incorrect to consider this provision as a mere marriage-related constitutional provision. Indeed, it has a tremendous ideological purpose and openly presented the young Georgian state’s attitude towards marriage, including the vicious tradition of forced and child marriages. This is further illustrated by the fact that constitution delegated the authority to the lawmaker to define the scope and restrictions of marriage in line with existing legal framework.²²

The initial edition of the 1995 Constitution of Georgia essentially repeated the wording of the First Constitution. The decision was inspired by a strong desire to create an ideological and hereditary bond with the first constitution rather than a mere constitutional regulation of marriage. For more clarity, the constitutional right to marry was slightly modified, and the word “between spouses”²³ was inserted in the article. From stylistic or grammatical perspectives, the change was merely technical, and there was no genuine need for such change. In such circumstances, it is impossible to assume that the concept of marriage was defined at the constitutional level since the essence of the legal provision derived from the First Constitution was not providing a legal definition. It was only as a general rule of conduct.

Following the adoption of the Civil Code of Georgia (since 1997), the code provided the legal definition of marriage, specifically as a union between a man and a woman for the purpose of founding a family. Furthermore, it mandated that marriage must be registered with the state’s relevant authorized entirety.²⁴ The provision mentioned above became the subject of a dispute in the Constitutional Court. The plaintiff, with completely immature and absurd reasoning, attempted to demonstrate how marriage-related provision in the Civil Law Code was in violation of the fundamental right to equality. The plaintiff’s reasoning was inconsistent and contradictory. While arguing that the legal provision in question violated the equality principle, it was also admitted that Georgia was not ready to expand the legal scope of marriage.²⁵ The Constitutional Court declared the case inadmissible because the plaintiff has argued against the constitutionality

²¹ Constitution of the Democratic Republic of Georgia, 21 February 1921, Article 40, Sentence 1.

²² *Ibid.*, Article 40, Sentence 2.

²³ Constitution of Georgia (Redaction of 24.08.1995), Article 36.

²⁴ Civil Code of Georgia, 1997, Article 1106.

²⁵ See: Citizen of Georgia Giorgi Tatishvili v. Parliament of Georgia, Judgment N2/11/714 of the Constitutional Court of Georgia, 29 December 2016, II-2.

of marriage-related provision and not against the fundamental right to equality.²⁶ There was no further development concerning this matter. Consequently, the legal understanding of marriage in the Civil law still revolves around marriage as a union of a man and a woman, thus remaining unchanged.

4. DEMYSTIFICATION OF THE CONSTITUTION

Legal normativism and, in general, hard positivism have been and continue to be employed to expel the non-legal elements from the law [Kelsen 1967]. Politics, especially in Georgia, represents one of the most significant non-legal categories in relation to law. It is always a combination of policy-makers' and executives' political views. Law often becomes the legislator's preference and a mechanism in a specific group's hands. This is especially noticeable when a purely technical law issue becomes a subject for political discussion.

As a result of the constitutional reform of 2017-2018, the revised Constitution incorporated a modified marriage-related provision that reads as follows: 'Marriage, as a union of a woman and a man for the purpose of founding a family, shall be based on the equality of rights and the free will of spouses'²⁷. The issue of marriage 'constitutionalization' was regarded as a red line regarding constitutional reform and a pivotal factor in the parliamentary election preceding this reform. It is worth mentioning that the case mentioned above was disputed in the Constitutional Court during this period.²⁸ Moreover, before the parliamentary elections in 2016, several political groups focused on existing "threats" to the institution of marriage and called for a constitutional interpretation of marriage. As a result, signatures for the referendum were collected [Gegenava 2020, 130]. Unsurprisingly, the religious aspect was tied to marriage, and in fact, it outweighed all the critical social or other issues that became popular in the pre-election campaign. The primary reason for the 'constitutionalization' of marriage was to protect marriage as a sacred and essential institution at the constitutional level; therefore, the narrow definition of marriage, with the primary focus on marriage as a union of a man and a woman, was explained to be protecting the welfare of the majority in society [ibid.]. In Georgia, a country with unending constitutional reforms [Gegenava 2017, 106-24]. Arguments in favor of something that requires constitutional protection have no practical

²⁶ Ibid., II-8.

²⁷ Constitution of Georgia, 24 August 1995, Art. 30(1).

²⁸ Citizen of Georgia Giorgi Tatishvili v. Parliament of Georgia, Judgment N2/11/714 of the Constitutional Court of Georgia, 29 December 2016, I.

power. The Constitution of Georgia experiences changes more often than marriage-related issues in the Georgian Civil Code.

The main purpose of law should be to protect a person's autonomy from encroachment by other persons [Herring 2010, 258]. The idea of personal autonomy lies in the fact that an individual, within the realm of feasibility, can shape their destiny and make choices that pertain to their own lives [Raz 1986, 369]. The state should refrain from interfering in private life as much as possible because all this still threatens the most important thing – freedom. Moreover, it is entirely illogical to intervene artificially in such a matter and regulate the issue with the Constitution, which is already regulated by the existing legislation. As a counterweight to this, it is impossible to motivate the constitutional protection of something because whether there is a change in the legislation or the Constitution, it needs the legitimacy of the majority of the people. Proposed constitutional or legislative amendments ought to seek majority consensus and approval. Otherwise, the established provision will be a defined rule of conduct without practical effectiveness. Failure to consider the social effect of law often brings catastrophic results.

The 'Constitutionalization' of marriage should not have serious legal consequences under contemporary law. This can be explained for numerous reasons; however, the most fundamental is a perception of the role of the Constitution; considering and understanding it as a mere legal instrument without a political component is, in fact, equivalent to changing its essence and status. In such circumstances, the 'Constitutionalization' of marriage is not only bringing life matters to the fore and publicity 'undressing' them but, to a certain extent, an attempt to make the Constitution mundane. The fundamental law of the state has essential legal, political, and social functions [Barak 2005, 370], and its significance is essentially undermined when its regulatory scope is restricted solely to the current legislative framework. The first republican motivation for defining marriage at the constitutional level no longer exists in modern Georgia; additionally, the structure and content of the Constitution have been entirely changed, establishing the scope of marriage, and determining the eligibility criteria for prospective spouses is not only inappropriate but also unaesthetic and unnatural. This discolors the face of the fundamental law and reduces its status.

CONCLUSION

The legal definition of marriage has evolved over time; however, even in modern times, the traditional understanding of marriage – a union of one man and one woman – prevails. The Contemporary era brought new challenges and pertinent matters necessitating immediate attention

and comprehensive resolution. Of course, this has led to significant changes; logically, its continuing effect will result in further developments. The question of who should be entitled to the right to marry requires an entirely different, more in-depth study. It is a distinct subject independent of research on the necessity to 'constitutionalize' marriage as an institution at the constitutional level.

Each state and its people have or should have the autonomy to determine their destiny, future and development path. There are priorities, legal techniques, and rational mechanisms for implementing these decisions. An objective assessment suggests that there is no legal basis for the existence of marriage in the constitution of the modern world. Alongside many other family law institutions, it falls under the purview of current legislation, and should remain within its scope. Otherwise, its artificial activation could lead to meaningless results.

Keeping the institution of marriage within the confines of constitutional regulation and later, during the 2017-2018 reforms, amending the provision and specifying who should be entitled to the right to marry was a purely populist decision, and it was strategically aligned with the voters' surface-level sentiments. Eventually, it accomplished its assigned tasks and overshadowed many topics and challenging constitutional reform issues. The state's insistence on regulating marriage on a constitutional level lacks a logical justification. It cannot be justified even for the purpose of providing stability, because even the country's fundamental legislation has not yet achieved stability. The legislator's actions demean the constitution, transforming it into a document regulating everyday matters rather than dealing with the state's significant challenges, including establishing the major developmental policies and limiting the government's inappropriate or abusive use of authority.

Much can be argued about preferences and legal technique, but marriage has no place in the modern constitutions. Traditionally, it should be regulated by civil legislation, with the utmost respect for personal autonomy.

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