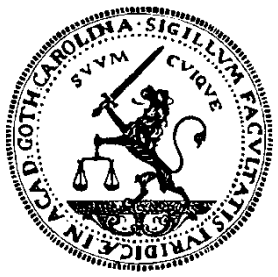

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Substantively Close, Legislatively Afar: Disparities between Citizens and Permanent Residents in Georgia

JAMM07 Master Thesis

International Human Rights Law
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Abstract

This thesis explores the legal position of permanent residents as compared to that of citizens in the case study of Georgia. With this aim, the thesis first examines the general legal system of the case study and delves into its sphere-specific regulations, which restrict access to different areas of life to permanent residents. The thesis then applies the standards extrapolated from the international human rights law (IHRL) to the findings of the case study, with a special emphasis on the operational standards of the European Convention on Human Rights (ECHR).

Throughout the analysis, the thesis employs the substantive understanding of equality to assess the case study findings, as well as to discover and examine the gaps within the IHRL itself. Additionally, this research explores the roots of the deeply ingrained exclusion of non-citizens and, in this regard, examines the interconnection between the concept citizenship and a modern sovereign state.

The thesis has identified that permanent residents in Georgia are subject to exclusionary regulations in healthcare, social security, labour market and economic activities. In some of these areas the exclusion is absolute (for instance, permanent residents are banned from becoming public servants), whereas in others the prohibition is partial (they have access to some of the state healthcare programmes). However, the effect of these restrictions is not limited to specific spheres; but in combination these restrictions also create an exclusionary regime that negatively affects the overall quality of life of permanent residents.

The assessment of the regulatory regime of Georgia revealed that some areas of exclusion in the legal system of Georgia can be evaluated as against the standards of the IHRL (as provided through the ECHR). However, the thesis additionally details the gaps and insufficiencies within the IHRL itself by identifying the spheres that are specifically eschewed from its protective regime, or the areas where the protective standards are not sufficient.

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1 Introduction

In 2017, the Parliament of Georgia adopted amendments to the Constitution. Among other controversial changes, the amendments also altered the content of the right to property by prohibiting the ownership of agricultural land by non-citizens. As a result, only the State, a self-governing unit, a citizen of Georgia or an association of citizens of Georgia are allowed to own agricultural land. Hence, non-citizens are, without distinction, barred from owning agricultural land in Georgia.

This restriction was a culmination of a decade-old constitutional "battle" between the Parliament and the Constitutional Court, which had, on three different occasions, declared unconstitutional the legislative norms of similar content. These cases, which demonstrated the strong standpoint of the Constitutional Court in favour of the universal right to property, were probably the very reason behind incorporating the restriction into the Constitution, which is out of reach for the Constitutional Court. And, while the Court's argumentation on these cases revolved around the right to property, the consideration of the aspects of equality was unavoidable, especially vis-à-vis resident non-citizens.[1] Exactly this disparity between citizens and non-citizens in Georgia is the central topic of this thesis.

The above-mentioned manifestation of the tensions between universal human rights and the will of the state in the citizen v. non-citizen debate is not the only example in Georgia: the Constitutional Court has had to adjudicate and decide on this issue in different spheres of life, such as social welfare benefits or the right to education. Furthermore, this debate is not bound by Georgian borders either. The European Court of Human Rights has had to adjudicate on state actions subjecting non-citizens to differential treatment in comparison with citizens from all over Europe: France,[2] Greece,[3] Latvia,[4] etc.

The worldwide prevalence of this tendency of subjecting non-citizens to differential (and discriminatory) treatment can have a myriad of reasons, depending on political, economic and social contexts, locally and internationally. But beyond these reasons are the very concepts of state sovereignty and citizenship that form the basis of the modern

[1] For example, *Citizen of Denmark - Heike Cronqvist v the Parliament of Georgia* [2012] Constitutional Court of Georgia No. 3/1/512 II-94–95.
[2] *Koua Poirrez v France* [2003] European Court of Human Rights App no. 40892/98.
[3] *Zeibek v Greece* [2009] European Court of Human Rights App no. 46368/06.
[4] *Andrejeva v Latvia* [2009] European Court of Human Rights App no. 55707/00.

international state system. The concept of citizenship represents an ultimate affirmation of belonging to a sovereign state, and thereby essentially prevents the equation of citizens' legal position to that of non-citizens, since this would imply the devaluation and sabotaging of the whole idea of citizenship.[5]

The sovereign right of the state to have full discretion in migration and handling of foreign "others" is so conventionally accepted and unquestioned that the distinction between citizens and non-citizens is rarely contested. Surely, we discuss the matters of migration, such as, for instance, the treatment of refugees, but we hardly examine these matters from the standpoint of equality, in other words, that they should have equal rights as citizens.

The above-described particularistic tendency eventually comes at odds with the universality of the concept of international human rights, which declares belonging to humanity as the source of human rights and, thus, requires equal treatment of humans, regardless of their other statuses, official or not. This is not to say that the international human rights law (IHRL) prohibits all kinds of differentiation between citizens and non-citizens; rather, it establishes the requirement of proportionate justifications, which goes well beyond the mere expression of arbitrary will by the state.

Admittedly, distinctions between citizens and non-citizens are not always unwarranted and, rather, in many cases and contexts they can be *prima facie* justified. However, the issue is that such distinctions are not contextualized. Instead, they are applied with the presumption that citizens and non-citizens are not equal by definition. This thesis builds on the substantive understanding of equality − a theory that focuses on the vulnerable − to adopt a closer, context-based perspective to the case of the legal system of Georgia and examines whether the disparities within the latter are rational, well-justified and linked to objective reasons.

The tendency of arbitrarily excluding non-citizens from (or privileging citizens within) different aspects of life is best illustrated by comparing citizens to a specific group of non-citizens - permanent residents. Permanent residents represent the category of non-citizens that stand substantively close to citizens: they are closely integrated within the society, pay taxes, participate in everyday life, and depend on the state socio-

[5] Phillip Cole, 'Introduction: "Border Crossings" — The Dimensions of Membership' 1 4 <https://doi.org/10.1057/9780230246775_1>.

economically to the same extent as citizens. Hence, their general standing is closely comparable with (if not equal to) that of citizens. For this reason, the thesis focuses on this particular group of non-citizens to illustrate state approaches that might be at odds with\come in conflict with substantive equality.

In order to research this issue comprehensively, the thesis adopts the case study method and maps the state-determined areas of disparity, creating a holistic picture of the exclusion of permanent residents. Georgia is selected as a case, as it is an under-studied case individually and also represents an under-researched region. At the same time, it is a young Europe-oriented democracy, with a turbulent past of nation-building and collective identity construction after the collapse of the Soviet Union. The case of Georgia is compelling with its legal, political, social, economic and historic context, where the struggle between the nationality-centred state and universal human rights is still fresh and relevant, as demonstrated by the case-law discussed in the beginning of this introduction on the right of ownership of agricultural land.

In accordance with the above, the core research question of the thesis is:

How does the legal position of permanent resident foreign nationals compare to that of Georgian citizens in the legislation of Georgia?

In order to answer this overarching question, the thesis identifies and answers the following sub-questions:

- What are the standards of treatment applied by the Georgian legislation to permanent residents and what are the areas and extent of distinction?
- How can the Georgian case be evaluated in light of IHRL\ECtHR?
- What are the answers of substantive equality to the national standards of Georgia and the international standards of the IHRL?

With these questions on mind, the text of the thesis is outlined as follow: Chapters 1 to 4 outline the framework for this thesis, in particular, what triggered its creation, what the extent of the literature on the topic is, what the theoretical perspective for this thesis is and, lastly, which methods it employs to examine the specific data and material. Chapter 5 provides a brief introduction to the case study of Georgia by informing the reader on its modern history, political and legal context. Chapter 6 represents the core part of the analysis, as it dissects the relevant parts of the legal system of Georgia. Chapter 7 analyses the standards and approaches of international law of human rights

(IHRL) with a special focus on the European Convention on Human Rights (ECHR). Chapter 8 applies the standards extracted from the ECHR to the findings from the case study. Chapter 9 discusses the perpetual clash of state sovereignty and the IHRL in light of the findings. Chapter 10 concludes the thesis and makes suggestions for further developing the research on the topic.

2 Literature review

This thesis studies the position of permanent residents as compared to that of citizens through the lens of international human rights law in the legal system of Georgia. In this regard, the project takes on the issue from a number of angles that are grossly under researched or are not researched at all.

First of all, this geographical choice of scope has not been employed before in the literature studying non-citizen equality issues. There exists rare literature on Georgia's non-citizens but they either discuss the matter of citizenship directly, only mentioning non-citizens in passing,[6] or review cases of xenophobia and racism.[7] Other examples include pieces on particular issues discussed in the project, for example, Gugushvili (2016),[8] which reviews the issue of land ownership by non-citizens from a political and historical perspective. However, there exists no comprehensive and systematic analysis of the Georgian legislation on non-citizens. In addition, the thesis adopts the perspective of the international human rights law and equality, which, to the best of my knowledge, have not been employed in this direction.

Non-citizen exclusion has been studied in various other countries. For instance, Hepworth (2016)[9] discusses the case of Italy and a 2014 report[10] reviews the cases of Ireland, Netherlands, UK, Croatia, Israel and Spain. However, these studies take up a more political perspective and rarely speak of equality in the meaning of international human rights law. Additionally, scholarship in this direction either studies marginal groups of non-citizens (such as irregular workers, refugees, etc.), or the whole spectrum of non-citizens. Neither of these approaches grants the opportunity to focus on the features of the particular group studied in this thesis or to fully analyse the context, which is at the heart of substantive equality analysis.

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[6] A Gugushvili, 'Country Report: Georgia EUDO Citizenship Observatory' [2012] Florence: European University Institute, Robert Schuman Centre for Advanced Studies.
[7] Tolerance and Diversity Institute, 'Racial Intolerance and Xenophobia: The Rights of Foreigners in Georgia' <https://osgf.ge/en/publication/racial-intolerance-and-xenophobia-rights-of-foreign-nationals-in-georgia/>.
[8] Alexi Gugushvili, '"Money Can't Buy Me Land": Foreign Land Ownership Regime and Public Opinion in a Transition Society' (2016) 55 Land Use Policy 142.
[9] Kate Hepworth, *At the Edges of Citizenship: Security and the Constitution of Non-Citizen Subjects* (Routledge 2016).
[10] Bridget Anderson, Isabel Shutes and Sarah Walker, 'Report on the Rights and Obligations of Citizens and Non-Citizens in Selected Countries' (2014).

Several authors have focused on the rights of permanent or long-term resident aliens. However, these works often review the treatment of these subjects in the light of European law, as in the case of Storgaard (2011).[11] Other papers researching the ECHR law pit the legal implications of these types of residency against the migration control power of the state. A few examples of the latter category include Thym (2014),[12] Wojnowska-Radzińska (2015)[13] and Crosby (2010).[14] In this regard, the project fills in a gap in literature by focusing on permanent residents and their equality rights in the daily life within the state, beyond migration control.

Furthermore, this thesis acknowledges the substantial scholarship on the interplay between citizenship, nation-state systems and human rights. Relatively recent distinctive works in this direction include Tambakaki (2010)[15] and Kesby (2012).[16] These authors offer their take on a wide range of issues related to the exclusion of non-citizens from diverse, interdisciplinary perspectives, including the international human rights standpoint adopted by Kesby. However, they cannot afford to focus on a narrow subject-group, or substantially consider equality standards and a concrete case study.

Taking into consideration these gaps in scholarly literature, the thesis modestly brings the narrow, on-point analysis of permanent residents in the context of an Eastern European, post-soviet country, Georgia, with a precise focus of international human rights and substantive equality. The following chapter outlines the scope of the thesis and its theoretical framework.

[11] Louise Halleskov Storgaard, 'The Long-Term Residents Directive: A Fulfilment Of The Tampere Objective Of Near-Equality?' [2011] The First Decade of EU Migration and Asylum Law 299.
[12] Daniel Thym, 'Residence as De Facto Citizenship? Protection of Long-Term Residence Under Article 8 ECHR' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2758636 <https://papers.ssrn.com/abstract=2758636> accessed 3 May 2020.
[13] Julia Wojnowska-Radzińska, *The Right of an Alien to Be Protected against Arbitrary Expulsion in International Law* (Hotei Publishing 2015).
[14] Andrew Crosby, 'Strengthening the Legal Position of Aliens' [2010] Juridische Meesterwerken VUB 321.
[15] Paulina Tambakaki, *Human Rights, or Citizenship?* (CRC Press 2010).
[16] Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012).

3 Scope and Theoretical Framework

The argumentation in this thesis can be roughly divided in 3 categories: *what* is the issue; *why* is it happening; and *how* it should be. These categories do not necessarily concur with the outline of the text; rather, they intersect in its different parts. For instance, the case of Georgia represents a mix of all three in different proportions.

3.1 The *What* of the Thesis

International human rights stand on the principles of universality and equality of human beings: we are all equal and should not be discriminated against. On the other hand, it is a well-established fact that states subject non-citizens to exclusions from the rights and freedoms they accord to their citizens. This is such a universal and traditional practice that its concrete manifestations rarely prompt public or even scholarly attention. Undoubtedly, there are cases where such exclusions are well-justified. To give an extreme example, granting electoral rights to tourists, who appear to be on the territory of a state during elections, would not only be unreasonable, but it would threaten the whole idea of electoral representation. However, beyond such uncontroversial matters remain a plethora of exclusion cases which give rise to valid questions and critiques from the perspective of the equality principle. Answers to these questions, if they appear through lengthy human rights litigation, rarely meet the threshold for justifications and almost always involve the presence of state sovereignty in the form of the "wide margin of appreciation" employed by the ECtHR or the reference to migration control, even when the context does not call for it.[17]

The scrutiny of the treatment of non-citizens through the lens of equality can be applied to every subgroup in the broad category of non-citizens: refugees, stateless persons, migrant workers, etc. However, this thesis opts to limit its scope to the specific category of permanent residents as they stand substantively closest to the citizens of Georgia in a number of aspects.

Permanent residency inherently implies that the right to reside in a host country does not depend on different conditions, such as work, studies, etc., but is guaranteed indefinitely. This means that an individual is not dependent on the state's periodic active expression of will in the form of temporary permits, but has been granted the

[17] Specific examples of these types of argumentation are discussed in Chapters 8 and 9

right to permanent residency that can be lost only as a result of irregular circumstances, such as criminal conviction, for instance.

In the legal system of Georgia, granting of permanent residency means that a person has been legally and continuously residing in the country for the past 6 years or is a close relative of a citizen of Georgia.[18] Both of these criteria point to a person's close social connections with the society and, hence, the country. Of course, the levels of integration vary from person to person, but in general, these individuals, through different circumstances, are engaged in Georgia's social life. Additionally, they are obliged to pay taxes in a similar way as Georgian citizens, according to the Tax Code of Georgia.[19]

The thesis considers that permanent residents are, in general, closely comparable to citizens, as they have a close connection with the society of the host state, their integration is stable or "permanent" as compared to other categories of non-citizens, and they contribute to the state's life socially and financially in the same way as citizens. This has also been affirmed in several cases by the Constitutional Court of Georgia, which has, for instance, emphasized that "foreigners residing in Georgia have a unique connection with the state, they are members of the Georgian society and, similar to citizens of Georgia, play a crucial role in the state's life, its progress and development. Foreigners residing in Georgia are intensely influenced by the legal system of Georgia and formation of normative order, as a rule, has the equal effect on their life, activities and development as on that of citizens' of Georgia."[20] This case, which is discussed in detail below (section 6.4.2.2), restored the right to own agricultural land to foreign nationals.[21]

Comparability, or the substantial closeness of the situation of two groups vis-à-vis the specific context their equality is disputed in, is at the heart of the assessment of non-discrimination. In order to assess whether a group has been differentiated unjustly against, first, its counterpart, the group compared to which the victim's rights have been restricted, should be identified and it should be confirmed that they are "in an analogous or relevantly similar situation."[22] Whereas the similarities are called forth in a formal

[18] Law of Georgia on the Legal Status of Aliens and Stateless Persons 2014 Article 15.
[19] Tax Code of Georgia 2010.
[20] *Citizen of Denmark - Heike Cronqvist v. the Parliament of Georgia* (n 1) II-94–95.
[21] The right was again restricted in 2018 by amending the Constitution.
[22] *Konstantin Markin v Russia* [2012] European Court of Human Rights App no. 30078/06 [125].

manner at first stages of discrimination assessment (i.e. as a proof of differentiation), at later stages, they represent the framework for the context of differentiation within which other elements of the case unfold. In other words, the essence of comparability or the level of closeness is the factual argument against differential treatment, which should be countered and outweighed if one aims to justify the said differentiation.

Therefore, by selecting as a focus group the subgroup of non-citizens that stands substantially closest to citizens in general, the thesis aims to show that the exclusion regime exists even when the differences between citizens and non-citizens are minimal or close to none. Additionally, focusing on permanent residents provides for the opportunity to avoid discussing formal requirements of comparability in most of the cases and to enter into a substantive discussion straightaway. Last, but not least, the characteristics accompanying permanent residency often help expose the unsubstantiated nature of the justifications behind such exclusions and, by doing so, reveal that, ultimately, these exclusions come down to expressing the will of the state to define and delimit its citizens, the in-group, versus non-citizens, and in this case, permanent residents, rather than serving public interests. For this reason, it can be argued that these exclusionary practices are not restrained by and do not comply with human rights.

3.2 The *Why* of the Thesis

The question of *why* in this thesis refers to the reasons behind the exclusionary regimes that exist in modern states with respect to non-citizens, even when they substantively stand equal with citizens. While the thesis accepts that there can be a wide variety of other reasons, both internationally and locally, it brings forward the argument that at the core of this exclusion is the matter of insider-outsider dichotomy, ingrained in the fabric of international system of sovereign states.

Statehood, as agreed in the international law and signified by the Montevideo Convention,[23] includes the requirements of a defined population, territory, government and capacity to enter into relations with other states.[24] An organizing principle for the

[23] Montevideo Convention on the Rights and Duties of States Done at: Montevideo 1934.
[24] Jan Klabbers (ed), 'The Subjects of International Law', *International Law* (Cambridge University Press 2013) <https://www.cambridge.org/core/books/international-law/subjects-of-international-law/53A76DB69F264AC06A38C8D569BB7BB8>.

entities that meet the criteria is provided by the Charter of the United Nations, which founds the organization the principles of sovereign equality of its members.[25]

The central objective of the UN ("to maintain international peace and security")[26] inevitably involves the regulation of the external behaviour of its members to some extent. However, the Charter also emphasizes that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."[27] These attributes – exclusion, non-intervention and autonomous representation in the international field – represent the so-called Westphalian sovereignty, which has shaped the world for centuries.[28]

The internal dimension of state sovereignty, to govern its subjects without external intervention, coupled with a defined territory and population as its jurisdiction, creates a common, distinct identity that unites people under the political concept of the nation or the legal concept of the state. The International state system is based on such entities and, in this sense, it is as much a way of organizing people, as a way of organizing territories.[29] In this perspective, the international field comprises of various separate communities of people with distinct identities and senses of belonging, and citizenship is an ultimate legal affirmation of this belonging.

The concept of citizenship has diverse political, social and cultural dimensions, but in a legal sense, it is a status that signifies a "legal bond between a person and [the state]"[30] and grants special rights and obligations. Beyond this simple declaration lies an absolutely central role that citizens hold in the life of a state: they are the signatories and makers of the social contract that gives birth to the state; through elections, they give legitimacy to state institutions and, hence, state sovereignty; they protect the state from external and internal threats, etc. In this perspective, a state can be defined as a "collectivity of citizens with certain civil, political and social entitlements."[31]

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[25] Charter of the United Nations 1945 Article 2(1).
[26] ibid Article 1(1).
[27] ibid Article 2(7).
[28] Anne-Marie Slaughter, 'Sovereignty and Power in a Networked World Order' (2004) 40 Stan. J. Int'l L. 283, 283–285.
[29] Emma Haddad, 'The Refugee: The Individual between Sovereigns' (2003) 17 Global Society 297, 300.
[30] Organic Law of Georgia on Georgian Citizenship 2014 3(1).
[31] Tharrileth K Oommen, *Citizenship, Nationality and Ethnicity: Reconciling Competing Identities* (Polity Press Cambridge 1997) 8.

This view of citizenship as an exclusive membership of a specific state illustrates well that as non-citizens are non-members and, thus, outsiders, they are not entitled to the same rights. Some schools of thought employ the extreme wording of friend v. enemy to signify this dichotomy between the "self" and the "other,"[32] but the effect of the ultimate exclusion of outsiders in the life of a state is not debated. Furthermore, scholars theorize that the existence of a citizen as the constructed "self" is dependent on the existence of the foreigner, or the "other," as "those who do not belong" help shape the citizen identity.[33]

These briefly outlined theories build up to the explanatory conclusion that citizenship is not a mere legal status but represents the constitutive political concept of a modern sovereign state and, thus, the international state system. From this standpoint, the very concept of a sovereign state inherently entails privileging citizens over non-citizens, or, in other words, "if the citizen is entitled to participate in the most valued activities of the community, then the non-citizen must be excluded from those activities, or else the very status of citizenship is devalued."[34] This tendency of exclusion-by-default can be observed in every aspect of migration and its national regulations, including, as the case study in this thesis also confirms, in the treatment of permanent resident aliens whose substantive position in the life of a state is almost identical to that of citizens from the perspective of equality.

Such particularistic notions of citizenship and state inevitably develop tensions with the universalist concept of human rights[35] and particularly with the substantive understanding of equality, which is not concerned with the questions of political identity, but stands on the side of outsiders and only accepts justifications based on the needs and necessities of individuals (or groups). The existence of these tensions is best noticeable in the concessions that have been made in support of both positions, for instance, in the form of the legal concept of "wide margin of appreciation" accorded to states by human rights courts, or the partial inclusion of foreigners in social welfare schemes.

[32] Haddad (n 13) 300 explaining Carl Schmitt's theory of political realism.
[33] ibid 305.
[34] Cole (n 5) 4.
[35] Tambakaki (n 15) 8.

However, analysing these divisions from the standpoint of human rights makes it evident that such exclusion practices, however inherent they might be, can be incompatible with the principle of equality and, as the case study clarifies, are still prevalent in the national regulatory systems of states.

3.3 The *How* of the Thesis

Along with exposing the crux of the issue and briefly delving into the roots, or the "why" of this issue, the thesis also provides a prognostic argumentation for solving the issue, or, in other words, answers the question of "how it should be." This part comes in the form of analysis of the case-study data, i.e. the legal system of Georgia.

The tools and standards for this analysis derive from the relevant provisions of the applicable international human rights law (IHRL) instruments and their interpretations established by various human rights bodies. This thesis develops its arguments from the standpoint of equality and, hence, these standards are the ones mainly related to non-discrimination and the position of non-citizens. However, there is no universal legal definition of equality and the substance of the principle varies not only from instrument to instrument, but can also take different forms case-by-case in the case-law of the same human rights court.[36] Additionally, the international human rights law certainly is a directly applicable law against which national legal systems can be assessed or criticized, but the inconsistencies within the IHRL itself also warrant criticism.

The elusive principle of equality is subject to various judicial or scholarly interpretations and, hence, takes different forms[37] and sub-forms (for instance, there has been a famous scholarly debate on the interpretation of the substantive equality theory).[38] Therefore, to anchor itself on a solid theoretical standpoint, the thesis employs the theory of substantive equality in the assessment of the data of the case study, as well as the inconsistencies within the IHRL.

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[36] see for example, Marie-Bénédicte Dembour, *Social Protection? All Are Equal, But Some More So than Others: (After Gaygusuz)* (Oxford University Press) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199667833.001.0001/acprof-9780199667833-chapter-10> accessed 3 May 2020.

[37] For example, see Po-Jen Yap, 'Four Models of Equality' (2005) 27 Loyola of Los Angeles International and Comparative Law Review 63.

[38] For example, see the scholarly debate in the form of replies and rejoinders between Sandra Fredman and Catharine MacKinnon, following a work of Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 712.

The theory of substantive equality goes beyond the requirements of the procedural understanding of equality anchored in consistency,[39] and shifts the focus from formal levelling of comparators to the context, the disadvantaged group and the outcome of the treatment. From this standpoint, the legal concept of equality has lately evolved to include the prohibition of indirect discrimination and the requirement of affirmative action.[40] As mentioned above, there is no uniform definition for this theory either and scholars have distinguished different models, such as, for instance, equality of opportunity and equality of results.[41] One of its most prominent forms is the four-dimensional approach developed by Sandra Fredman, who identifies the following principles as the core of the substantive equality model: redressing disadvantage; addressing stigma and stereotyping; enhancing voice and participation; and accommodating difference and structural change.[42] However, the core idea of substantive equality can be perfectly summed up as "the basic principle that the right to equality should be located in the social context, responsive to those who are disadvantaged, demeaned, excluded, or ignored."[43]

This thesis opts for the substantive understanding of equality exactly because its foundational focus on the vulnerable best equips it to support the study unravel and contextualize all the aspects of the insider-outsider discussion,[44] the ultimate manifestation of which is the citizen v. non-citizen debate in the sovereign state based on citizenship. Furthermore, international human rights courts, [45] as well as national courts, [46] increasingly apply the substantive understanding of equality in the case-law through human rights adjudication. The Constitutional Court of Georgia, on its part,

[39] Catherine Barnard and Bob Hepple, 'Substantive Equality' (2000) 59 The Cambridge Law Journal 562, 562–563.
[40] Fredman, 'Substantive Equality Revisited' (n 38) 715.
[41] Daniel Moeckli and others (eds), *International Human Rights Law* (Third edition, Oxford University Press 2018) 148.
[42] See, Fredman, 'Substantive Equality Revisited' (n 38).
[43] ibid 713.
[44] Kelley Loper, 'Substantive Equality in International Human Rights Law and Its Relevance for the Resolution of Tibetan Autonomy Claims' (2011) 37 North Carolina Journal of International Law and Commercial Regulation 1, 8–11.
[45] See for example, Anne-Claire Gayet, 'The Inter-American Court of Human Rights' in Marie Mercat-Bruns, David B Oppenheimer and Cady Sartorius (eds), *Comparative Perspectives on the Enforcement and Effectiveness of Antidiscrimination Law: Challenges and Innovative Tools* (Springer International Publishing 2018) 544–545 <https://doi.org/10.1007/978-3-319-90068-1_30> accessed 4 May 2020; Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 Human Rights Law Review 273.
[46] Catherine Albertyn, 'Substantive Equality and Transformation in South Africa Substantive Equality' (2007) 23 South African Journal on Human Rights 253.

has also noted that "In the scope of this [equality] principle the core objective and function of the state cannot be levelling of persons, as it would contradict the substance of the right to equality. The idea of equality aims to ensure equality of opportunity, or, in other words, equality of opportunity for human self-realization in different spheres of life."[47]

Last, but not least, the substantive model of equality, with its focus on the necessity, the context and state's positive obligations, perfectly fits the socio-economic matter of social welfare,[48] which represents the most important part of this thesis. Certainly, excluding permanent residents from the welfare benefit system qualifies as distinction from a formal perspective as well. However, the substantive concept of equality considers not only the procedural disparity between groups, but also the needs of the disadvantaged, the psycho-social implications of this exclusion and the prejudice against vulnerable groups that unequal treatment can enforce or cause in the long-term perspective. In this sense, the substantive equality model considers social welfare benefits not as a "gift" from the state, which can tolerate some differences, but as the action necessitated by the needs of the vulnerable, which requires close scrutiny and a high degree of equality in its administration.

In conclusion, for the above reasons, this thesis applies the scrutiny from the perspective of substantive equality to the case study and its findings, as well as to the principles and standards of equality extrapolated from the analysis of the IHRL instruments and case-law. The following chapter briefly outlines the material and methods employed for this purpose.

[47] *Political Associations of Citizens - 'the New Rights' and 'the Conservative Party of Georgia' v the Parliament of Georgia* [2010] Constitutional Court of Georgia No. 1/1/493 II–1.
[48] Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 South African Journal on Human Rights 163.

4 Methods and Materials

The core research theme of this thesis is the matter of equality between citizens and non-citizens in the specific case of Georgia. With this aim in mind, the thesis delves into several sub-questions as provided in the introduction.[49] This chapter briefly discusses the methods employed and the material studied for each sub-question.

A general feature of the research design that is common for all the parts of the thesis is the legal doctrinal method, as the thesis primarily asks the question of "what is the law"[50] in international and national laws of Georgia and proceeds "to identify, analyse and synthesise the content of the law."[51] In this sense, the thesis employs the deductive form of interpretation to identify the explicit content of the law, and inductive or analogy-based methods[52] to extract its implied meaning and effect via consulting other laws, case-law or other contextual information. Therefore, rather than conducting a simple textual analysis, the thesis adopts a teleological interpretation method.

To answer the first sub-question and identify the standards of treatment applied by the Georgian legislation to permanent residents, as well as the areas and extent of distinction, the thesis relies on the doctrinal teleological analysis of the Georgian law and case-law and puts this analysis in the country's political and historical context. At the same time, the thesis employs the information provided through unstructured, informal interviews with the representatives of the Public Defender's Office, different civil society organizations and government agencies (6 respondents in total).[53]

The second sub-question on the standards of equality of the IHRL are answered by analysing the International Bill of Human Rights, the European Convention on Human Rights and other relevant treaties through the above described methods. The thesis also takes into consideration the interpretation methods provided by Article 31-32 of the

[49] 1. What are the standards of treatment applied by the Georgian legislation to permanent residents and what are the areas and extent of distinction? 2. How can the Georgian case be evaluated in light of IHRL\ECtHR? 3. What are the answers of substantive equality to the national standards of Georgia and the international standards of the IHRL?

[50] Suzanne Egan, 'The Doctrinal Approach in International Human Rights Law Scholarship' [2018] Research Methods in Human Rights 24, 25.

[51] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' [2018] Research methods in law (2nd Edition): 8, 9.

[52] Egan (n 50) 25–26.

[53] More interviews in a formal format were planned, but travel restrictions and other negative impacts of COVID-19 obstructed the process. Some respondents only had a limited time, while others cancelled.

Vienna Convention on the Law of Treaties (1969).[54] At the same time, significant attention is paid to the scholarly literature on the nature of human rights in general and on equality in particular.

The third sub-question, analysing the national standards of Georgia and the international standards of the IHRL through the lens of substantive equality is addressed mainly through applying the standards extracted from the analysis of international and national case-law and theory literature on substantive equality to the findings on the legal system of Georgia.

[54] Vienna Convention on the Law of Treaties 1969

5 Background to the Case Study: Georgia

5.1 Political Context

The modern history of Georgia starts with the collapse of the Soviet Union, and this transition was anything but smooth and peaceful for the country. In 1991, the Supreme Council of Georgia[55] adopted the Act of Restoration of State Independence[56] on 9 April, the day marking tragic atrocities committed by the USSR forces against the independence movement demonstration in Tbilisi 2 years prior.[57] By the end of 1991, the country was engulfed in a civil war between the democratically elected government and paramilitary groups.[58]

Apart from the war in the capital, Georgia simultaneously faced two armed secessionist conflicts in the regions of Abkhazia and South-Ossetia during the period of 1991-1993. These wars were a consequence of various intertwined factors, including highly nationalistic attitudes within the dominant political powers in Georgia; heightened ethnic tensions in the regions; Russia's inciting of and often direct military involvement in these conflicts; etc.[5960] The results of this destructive turmoil were beyond repair: tens of thousands of lives were lost and hundred thousands more became internally displaced only from Abkhazia.[61] While Georgia more or less recovered from its civil war, the ruptures left from the separatist conflicts have become wider if anything, and the tremors left from these tragedies still ring today, manifested in occasional

[55] The Supreme Council of the Republic of Georgia was the successor of the USSR legislative body.
[56] Supreme Council of the Republic of Georgia, Act of Restoration of State Independence of Georgia 9 April 1991
[57] Archil Gegeshidze, 'The 9 April Tragedy — a Milestone in the History of Modern Georgia' (10 April 2019) <https://www.orfonline.org/expert-speak/the-9-april-tragedy-a-milestone-in-the-history-of-modern-georgia-49801/> accessed 5 April 2020.
[58] Pavel K Baev, 'Civil Wars in Georgia' in Jan Koehler and Christoph Zürcher (eds), *Potentials of disorder* (Manchester University Press 2018) 131–132 <http://www.manchesterhive.com/view/9781526137586/9781526137586.00012.xml> accessed 5 April 2020.
[59] ibid 134–140.
[60] Gia Nodia and Álvaro Pinto Scholtbach, *The Political Landscape of Georgia: Political Parties: Achievements, Challenges and Prospects* (Eburon Uitgeverij BV 2006) 10.
[61] Baev (n 58) 140.

abductions of Georgian citizens by the separatist regimes' forces[62] or even the so-called 5-day war between Georgia and Russia in 2008.[63]

Armed conflicts were just one form of the mayhem that wrecked Georgia in the 1990s. Economic collapse, dramatic increase in crime, paramilitary groups roaming the country and racketing people, and the absence of basic government structures placed the country in the "failed state" category.[64] However, by 1995, consolidated political powers managed to adopt the Constitution of Georgia, which established a groundwork for a functional government structure.[65] However, many of the problems which were prevalent throughout the turmoil proved to be persistent and remained unsolved.[66]

Public discontent, accumulated over the years, erupted into the Rose Revolution in 2003. The revolution, sparked by the rigged election results, ended with a peaceful power transition and brought a younger generation of politicians with explicitly west-oriented ideas, led by Mikheil Saakashvili, into the government.[67] The following years were characterised by swift and effective reforms in the police, education system, zero-tolerance policies towards criminal organizations and a rapid economic growth.[68] However, this period had its dark side too - the Government became more and more dependent on police brutality and surveillance, violent repression of political opponents, and the restriction of media and freedom of expression.[69] Concrete manifestations of this disregard of human rights have reached the European Court of Human Rights, which has found Georgia in violation of the Convention a number of times.[70]

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[62] Nino Chibchiuri, 'Abduction of Georgian Citizens by the Occupation Forces and the Execution of the So-Called "Budgets" at the Expense of Abduction Pay-Offs.' (*Factcheck.ge*) <https://www.factcheck.ge/en/story/37965-abduction-of-georgian-citizens-by-the-occupation-forces-and-the-execution-of-the-so-called-budgets-at-the-expense-of-abduction-pay-offs> accessed 5 April 2020.

[63] Chris Harris, 'Europe's Forgotten War: The Georgia-Russia Conflict Explained a Decade On' (*euronews*, 7 August 2018) <https://www.euronews.com/2018/08/07/europe-s-forgotten-war-the-georgia-russia-conflict-explained-a-decade-on> accessed 5 April 2020.

[64] Anna G Gabritchidze, 'Transition in the Post-Soviet State: From Soviet Legacy to Western Democracy?' (Ohio University 2010) 12 <http://rave.ohiolink.edu/etdc/view?acc_num=ohiou1289943668>.

[65] Nodia and Scholtbach (n 60) 13.

[66] ibid 15–18.

[67] ibid 18–21.

[68] ibid 22–25.

[69] International Federation for Human Rights and Human Rights Centre, 'Human Rights Violations in Georgia' (2007) <https://www.fidh.org/IMG/pdf/ge1510a.pdf> accessed 7 April 2020.

[70] *Ildani v Georgia* [2013] European Court of Human Rights App no. 65391/09; *Dvalishvili v Georgia* [2012] European Court of Human Rights App no. 19634/07; *Kukhalashvili and others v Georgia* [2020] European Court of Human Rights App nos. 8938/07 and 41891/07.

In 2012, mass protests triggered by videos showing severe human rights violations against prisoners preceded Saakashvili's party's defeat in the Parliamentary elections and oligarch Bidzina Ivanishvili and his coalition, the Georgian Dream, came into power.[71] This event marked the first peaceful (non-revolutionary) transition of government in Georgia[72] and the Georgian Dream has been keeping majority of Parliament seats since then.

In 2014, Georgia signed an Association Agreement with the European Union, deepening its cooperation with the EU and taking obligations to implement reforms in numerous areas, including public administration, agriculture and the justice sector.[73] Despite a number of completed and ongoing reforms, the Georgian Dream government is far from ruling without controversies and well-deserved harsh criticisms from the Georgian civil society and international organizations alike. Few recent events that the Government have been condemned for include a violent crackdown on the demonstration on 20 June 2019,[74] alleged persecution and prosecution of political opponents,[75] selective mistreatment of free media companies,[76] severe cases of police violence,[77] and selection of the Supreme Court judges in a highly questionable process.[78]

This short timeline of the dynamic politics of Georgia does not have an ambition to provide a comprehensive political or historical analysis as it leaves out numerous

[71] Luke Harding and Miriam Elder, 'Georgia's President Saakashvili Concedes Election Defeat' *the Guardian* (2 October 2012) <http://www.theguardian.com/world/2012/oct/02/georgia-president-saakashvili-election-defeat> accessed 7 April 2020.
[72] Charles H Fairbanks and Alexi Gugushvili, 'A New Chance for Georgian Democracy' (2013) 24 Journal of Democracy 116, 116.
[73] 'Georgia and the EU' (*EEAS - European External Action Service - European Commission*) <https://eeas.europa.eu/headquarters/headquarters-homepage/49070/georgia-and-eu_en> accessed 14 April 2020.
[74] Shaun Walker, 'Dozens Injured after Georgia Police Fire Rubber Bullets at Demonstrators' *The Guardian* (21 June 2019) <https://www.theguardian.com/world/2019/jun/20/georgian-police-teargas-crowd-russian-lawmaker-parliament> accessed 7 April 2020.
[75] 'Georgian Opposition Leader Gets Three More Years in Jail' *Reuters* (10 February 2020) <https://www.reuters.com/Article/us-georgia-opposition-arrests-idUSKBN204283> accessed 7 April 2020.
[76] 'Georgian Government to Seize Overdue Taxes from TV Companies Kavkasia, Pirveli, and Rustavi 2' (*OC Media*, 26 December 2019) <https://oc-media.org/georgian-government-to-seize-overdue-taxes-from-tv-companies-kavkasia-pirveli-and-rustavi-2/> accessed 7 April 2020.
[77] 'Prosecutor's Office Closes Investigation of High-Profile Machalikashvili Case, Reveals "No Abuse of Authority"' (*Agenda.ge*, 28 January 2020) <https://www.agenda.ge/en/news/2020/269> accessed 7 April 2020.
[78] Office for Democratic Institutions and Human Rights, 'Second Report on the Nomination and Appointment of Supreme Court Judges in Georgia' (Organization for Security and Co-operation in Europe 2020) <https://www.osce.org/odihr/443494> accessed 7 April 2020.

important details from the Georgian tale of transformation from a cog in the massive USSR machine to a functioning state based on the principles of democracy, rule of law and human rights. However, this section aims not to scrupulously recount history, but to provide a brief overview that gives the impression of how dynamic, hectic and volatile Georgian independence has been.

Georgia's rapidly changeable post-USSR past had its effect on its form of government too: while Shevardnadze's period (1994-2003) can be characterised as a strong presidential model, the form of government in the country slowly shifted to semi-parliamentary form during Saakashvili's rule[79] (2003-2013) and to a strong parliamentary model with the latest constitutional amendments.[80] The Georgian electoral system has been going through a transition as well: parliamentary elections in Georgia are shifting from a mixed to a fully proportional electoral system.[81]

The events and tendencies described above certainly had significant implications for human rights in general and equality in particular. Subsequent sections discuss the legal framework and the institutions and organizations that have played a major role in protecting and promoting human rights, including the rights of aliens in general and those of permanent residents in particular.

5.2 State Institutions on the Guard of Human Rights

The fundament of the legal framework in Georgia – "the supreme law of the state"[82] – is the Constitution, which determines the political system, establishes state institutions, and, most importantly, provides protection for human rights and freedoms. According to the Constitution, Georgian state authority is based on the principle of the separation of powers[83] between the legislature, the executive branch, and the judiciary. In the parliamentary form of government, with the president holding symbolic powers, the executive powers are concentrated in the government, members of which are picked by the Parliament, or, in the case of Georgia, by the party holding the majority of seats. In

[79] Fairbanks and Gugushvili (n 72) 119.
[80] Constitution of Georgia 1995.
[81] Igor V Bondyrev, Zurab V Davitashvili and Vijay P Singh, 'Laws and Government' in Igor V Bondyrev, Zurab V Davitashvili and Vijay P Singh (eds), *The Geography of Georgia: Problems and Perspectives* (Springer International Publishing 2015) 219–220 <https://doi.org/10.1007/978-3-319-05413-1_20>.
[82] The Constitution Paragraph 4 of Article 4.
[83] ibid Paragraph 3 of Article 4.

this context, the judiciary gains more significance in maintaining checks and balances in different areas, including the protection of human rights and freedoms.

The judicial branch in Georgia comprises Common Courts and the Constitutional Court.[84] The Common Courts of Georgia consist of three instances[85] and are tasked to administer justice in the country.[86] The Constitution asserts the principle of judicial independence and, to this end, establishes the High Council of Justice, dominated by the representatives of judiciary.[87]

The judiciary, as a whole, falls within the focus of this thesis, but the Constitutional Court, its functions and case-law hold a central role for its purposes. The Constitutional Court is the body of constitutional control[88] and has authority to adjudge on the range of issues. The most substantial of its powers is to review the constitutionality of normative acts, [89] especially, on the basis of a complaint presented by individuals, legal persons and the Public Defender of Georgia.[90] In this manner, the Court ensures the protection of various human rights, including those of aliens, through a progressive interpretation of the Constitution's bill of rights.[91] For instance, in a case lodged by the Public Defender, the Court reviewed and declared unconstitutional with respect to paragraph 1 of article 42 the rule conferring the right to lodge a constitutional complaint only to aliens "residing in Georgia" and legal persons "of Georgia." According to the reasoning in the case, the disputed norm did not completely account for the persons under the jurisdiction of Georgia, who enjoyed the rights conferred by the Constitution and, thus, should have been able to refer to the Constitutional Court in case of violations.[92]

The Public Defender's Office, as the above case demonstrates, also plays a major role in ensuring that human rights and freedoms are protected and respected. It is a constitutional body tasked with the "supervision of the protection of human rights" and

[84] ibid Paragraph 1 of Article 59.
[85] Organic Law of Georgia on Common Courts 2009 Paragraph 1 of Article 2.
[86] The Constitution Paragraph 3 of Article 59.
[87] ibid Article 64.
[88] The Constitution Paragraph 2 of Article 59.
[89] Definition of a "normative act" is provided by Article 2 of the Organic Law of Georgia on Normative Acts. According to this provision, normative act is a legal act that "contains general rules for its constant or temporary and multiple application."
[90] ibid Sub-Paragraph a of Paragraph 4 of Article 60.
[91] ibid Chapter Two.
[92] *The Public Defender of Georgia v the Parliament of Georgia* [2010] Constitutional Court of Georgia No. 1/466.

represents Georgia's national human rights institution. The Public Defender's dissent has accompanied the actions of Georgian state authorities through different parties in power. Among other violations and concerns, the Public Defender has also been vocal about alien's rights and, in particular, about the arbitrary practice of the rejection of residence permits or entry into the country justified by the vague reasons of "state security" or "public order."[93]

[93] 'The Situation in Human Rights and Freedoms in Georgia 2018' (The Public Defender of Georgia 2018) 331–332 <http://www.ombudsman.ge/res/docs/2019101108583612469.pdf> accessed 7 April 2020.

6 General Legal Framework: Georgia and Permanent Residents

As explained in the previous chapters, this thesis revolves around how the rights of non-citizens in general, and of permanent residents in particular differ from the ones the citizens are entitled to. Consequently, it focuses on equality and non-discrimination systems that exist (or do not exist) in Georgia and shape the position of non-citizens in the Georgian legal system.

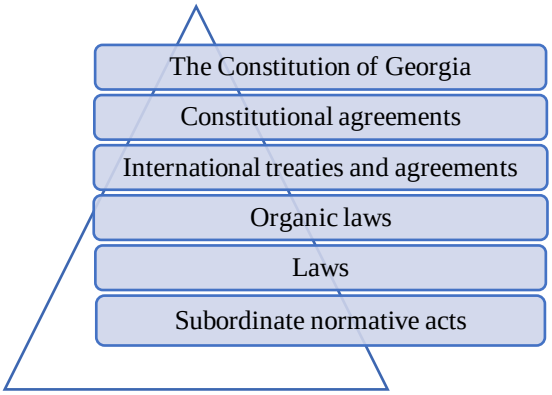

Figure 1: The hierarchy of normative acts in Georgia

6.1 The Constitution of Georgia

The discussion of equality in the Georgian context inescapably starts with the Constitution, which, as stipulated by the Law on Normative Acts (Figure 1), tops the hierarchy of normative acts in Georgia. The Preamble of the Constitution only mentions "universally recognised human rights and freedoms" as the aim for the *citizens* of Georgia in devising the Constitution. The Constitution also refers to the universality of human rights in the core text and regards them as "eternal and supreme human values," which bounds the state as a directly applicable law (Article 4(2)). The same Article asserts that the Constitution also recognizes universally recognized human rights other than the ones explicitly provided by the Constitution.

Article 5 of the Constitution declares Georgia a social state and states that the State should "take care of" "strengthening the principles of social justice, social equality and social solidarity within society." The provision then recounts the range of social areas that fall within its scope and, notably, only reserves for citizens the area of employment under this provision. While this could suggest that social development in other areas include non-citizens too, this is not the case in practice, as further analysis of the legislation demonstrates.

Chapter 2 of the Constitution lays the groundwork for the protection of human rights in Georgia. It is titled "Fundamental Rights" and consists of the human rights and freedoms ranging from "inviolability of human dignity" (Article 9) to the right to marry (Article 30). The general rule stipulated by the Constitution is that "citizens of other states … living in Georgia shall have rights and obligations equal to those of citizens of Georgia except in cases provided for by the Constitution and law" (Article 33(1)). However, the Constitution itself goes on to reserve number of rights for the citizens of Georgia only.[94]

The function of Chapter 2 is to extend constitutional protection to the right holders and their listed rights. Hence, when certain provisions only apply to citizens, that entails that the Constitution does not guarantee these rights for others (i.e. non-citizens) and should not be interpreted as a restriction of any kind. In other words, if the Parliament decides to extend the right to hold public office to foreigners, the Constitution would not restrict it, but if the Parliament then decides to annul this decision, the Constitution would not protect the laid off aliens either. Therefore, in cases where the Constitution itself does not explicitly or implicitly restrict the application of certain rights to aliens, it does not have anything against higher standards set by the legislator or established by the ECHR for that matter.

Apart from providing various substantive rights, the Constitution also asserts that "all persons are equal before the law. Any discrimination on the grounds of race, colour, sex, origin, ethnicity, language, religion, political or other views, social affiliation, property or titular status, place of residence, or on any other grounds shall be prohibited" (Article 11). This provision is central for the constitutional equality system and resembles Article 26 of the ICCPR and Paragraph 1, Article 1 of Protocol 12 of the ECHR. It operates as an independent substantive clause as it guarantees non-discrimination in every aspect of life and is not tied to other constitutional provisions. Article 11 is also an open-ended clause and protects persons from discrimination on the grounds not listed in the text. However, whether the ground is listed or not can play a

[94] The right to enter the country (Article 14); the right to own agricultural land (Article 19); active and passive electoral rights (Articles 23 and 24); the right to hold a public office (Article 25); the right to state-funded vocational and higher education (Article 27); the right to affordable and quality health care services (Article 28).

decisive role in the assessment of differentiation for the Constitutional Court, hence, in the interpretation of Article 11.

The Constitutional Court uses two different tests in the assessment of the differentiating normative act: the rational basis test and the strict scrutiny test.[95] The Court applies the strict scrutiny test when the differentiation ground belongs to the list provided by Article 11 and when the intensity of differentiation is high. [96] The strict scrutiny test entails the application of the proportionality test with an addition that it requires interference to be *absolutely necessary* and the existence of the state's *overwhelming interest* (emphasis added).[97] In contrast, the rational basis test sets a low bar for the norm under scrutiny as it is enough to substantiate that there was a rational link between the objective reason behind the differentiation and its result.[98]

Citizenship is not explicitly named among the "classical grounds" in Article 11 of the Constitution and, pursuant to the case-law of the Constitutional Court, it does not implicitly fall within the scope of other grounds such as "origin" for example, either.[99] Therefore, the level of scrutiny the Constitutional Court employs to assess the differentiation against non-citizens is completely dependent on the intensity of the differentiation. This is not just a procedural matter, but, as the Constitutional Court is the main interpreter of the scope of constitutional rights, it also defines the substantive content of the non-discrimination regime. In other words, what constitutes discrimination under Article 11 of the Constitution is completely dependent on the intensity of differentiation, which, on the other hand, is measured by "how evident is the disparity between two groups in the participation in a concrete social relation,"[100] or to put it simply, depends on the context. This approach seems to be contrary to the approach of the European Court of Human Rights, which requires weighty reasons to justify differentiation on the ground of nationality. Nonetheless, both the Georgian Constitutional Court and the ECtHR are extremely mindful of the context of the differentiation in the assessment process.

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[95] *The Public Defender of Georgia v the Government of Georgia* [2015] Constitutional Court of Georgia No. 2/4/603 II–8.
[96] ibid.
[97] *Political Associations of Citizens - 'the New Rights' and 'the Conservative Party of Georgia' v. the Parliament of Georgia* (n 47) II–7.
[98] ibid II–6.
[99] *Citizens of the Republic of Armenia - Garnik Varderesian, Artavazd Khachatrian and Ani Minasian v the Parliament of Georgia* [2018] the Constitutional Court of Georgia No. 2/9/810,927 II–18.
[100] ibid II–19.

In conclusion, the Constitution of Georgia guarantees general equality for aliens and, on the other hand, reserves its protection for only citizens in certain areas of life. The Constitution's human rights clauses stipulate the minimum standard and formally do not hinder authorities to guarantee higher standards and broader scope for the rights within.[101] However, the existence of constitutional limitations, such as reserving the rights for citizens, indicate that there is a consensus on the matter so common and widely supported that it is enshrined in the most fundamental of legal acts of the country. The Constitution is an act that constitutes the defining elements of the state and its identity, and it is only logical that it addresses the issues of citizenship, migration, the rights accorded to aliens, and the rights exclusively reserved for its makers, the nationals of the particular nation-state.

Whereas the matters of national identity and constitutional regulatory sphere can have different levels of connection depending on state's political history, this link is extremely adjacent in states "where the formation of the nation came relatively late in time and/or where its emergence was relatively abrupt and radical."[102] In 1995, Georgia was slowly sobering up from the USSR-forced colonial torpor and was recovering from the wounds of the recent wars. At the same time, it had a plethora of questions to address about its identity, and it is no coincidence that the Constitution's Preamble starts with the words "We, the citizens of Georgia."

6.2 Relevant Laws and Treaties

According to the Law on Normative Acts (see Figure 1), the Constitution is followed by constitutional agreements, international treaties and agreements, organic laws, and laws, respectively.[103] Therefore, and as affirmed by the following provision, "International agreements and treaties of Georgia … shall take precedence over domestic normative acts unless they contradict the Constitution of Georgia" (Article 7(5)). Consequently, international human rights treaties can fill the gaps left by the Constitution and its protective regime and dictate the content of laws.

[101] There are exceptions where the Constitution explicitly limits the scope of the right, e.g. the right to own agricultural land, as discussed above.
[102] Jon Elster, Claus Offe and Ulrich K Preuss, *Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea* (Cambridge University Press 1998) cited in Yeşim Bayar, 'Constitution-Writing, Nationalism and the Turkish Experience: Constitution-Writing, Nationalism and the Turkish Experience' (2016) 22 Nations and Nationalism 725.
[103] Organic Law of Georgia on Normative Acts 2009 Paragraph 3 of Article 7.

In this context, it is interesting to observe how Georgia slowly gained footing after its wars not only domestically, but on the international stage as well, including the international human rights field. Georgia ratified number of core UN treaties, inter alia, the ICCPR and the ICESCR, in 1994, then in 1999 the ECHR was ratified. In 2001 and 2002, Georgia ratified ECHR Protocol No. 12 and Protocol No. 1, respectively. The content and relevant provisions of these treaties are discussed below, and it will suffice to note here that these treaties, especially the ECHR and its respective case-law, have played a major role in shaping the Georgian human rights setting.

Apart from international treaties, it is important to mention the so-called anti-discrimination law of Georgia, adopted in 2014. The law asserts that its aim is to eliminate all forms of discrimination and ensure equality for all, inter alia, for the discriminated on the ground of citizenship (Article 1). In its comprehensive definition of discrimination, the law identifies direct, indirect and multiple discrimination, and acknowledges positive actions or "temporary special measures" (Article 5). However, its comprehensive content and protective mechanisms do not go beyond practice and, at the same time, cannot do anything against discriminatory practices that arise from other normative acts.

6.3 Where do Permanent Residents Fit in the Legislation?

Section 6.4 discusses the position of permanent residents vis-à-vis separate, sphere-specific regulations, such as the ownership of land or access to particular occupations. Before, however, it is important to note regulatory frameworks that provide generally applicable definitions and rules for aliens broadly and permanent residents in particular.

The discussion on the position of permanent residents in the legal system of Georgia inevitably starts with its definition i.e. who is a permanent resident in the perception of Georgia's legislature (and, thus, arguably, in the perception of Georgian society as well). In the citizen-foreigner dichotomy, the features of the former help identify the features of the latter, and vice versa.[104] Therefore, in order to understand what foreigner (or its particular form) means, it is vital to first look at the definition of "citizen" in the laws of Georgia.

[104] Emma Haddad, 'The Refugee: Forging National Identities' (2002) 2 Studies in Ethnicity and Nationalism 23, 29.

The Citizenship Law,[105] while regulating the matters of citizenship, provides its definition. According to it, citizenship means "a legal bond between a person and Georgia" (Article 3(1)) The Law recognizes two forms of acquiring citizenship: by birth and by naturalization (Article 9(1)). However, to acquire citizenship by naturalization (under a regular procedure) one needs to: have lawfully resided in Georgia for the last 10 consecutive years; know the official language of Georgia; know the history of Georgia and basic principles of law; have a job and/or real estate in Georgia, or conduct business on the territory of Georgia or hold an interest or shares in a Georgian enterprise (Article 12(1)). Non-citizen spouses of Georgian citizens acquire citizenship under a simplified procedure, i.e. they need to have resided in Georgia for 5 consecutive years and have knowledge of the language, history and law (Article 14(1)). Notably, these are the requirements permanent residents need to meet to create a "legal bond with Georgia" and overcome the exclusions established for them by the legislation. Furthermore, the core substance of this thesis, the analysis of exclusions set for permanent residents, simultaneously represents the analysis of the privileges accorded to the citizens as for the purposes of this equality-centred thesis, these two groups represent comparators.

The second, and most notable, legislative framework is the Law on Aliens and Stateless Persons,[106] which, among other matters, regulates the rights and duties of aliens while staying on the territory of Georgia, including the rights and duties of permanent residents. The Law defines an alien as "a person who is not a citizen of Georgia" (Article 2(a)). Pursuant to the law, a permanent residence permit is "issued to a spouse, parent, and child of a citizen of Georgia. A permanent residence permit shall also be issued to an alien who has lived in Georgia for the last 6 years on the basis of a temporary residence permit" (Article 15(g)).

Chapter 6 of the Law shapes the position of aliens by determining their entitlements and limitations. According to this Chapter, the aliens are equal to Georgian citizens "unless otherwise provided for by the legislation of Georgia" (Article 25(1)). and reaffirms their constitutional rights.[107] At the same time, the Law imposes certain duties on aliens, such as to comply with Georgian laws, respect local culture and values, and

[105] Citizenship Law.
[106] Law on Aliens and Stateless Persons.
[107] for instance, property rights, the right to marry, freedom of speech, freedom of movement, etc

pay taxes (for residents) (Article 26 and 39). Notably, the Law implicitly creates a taxonomy of aliens: there are provisions that apply to all types of aliens, the ones that apply to residents and the ones that apply to permanent residents.[108]

The Law represents a crucial compilation of the regulations of aliens' rights and freedoms, but its provisions are mainly broad and leave wiggle room for sphere-specific frameworks. For instance, it provides the right to education for aliens, but does not elaborate on specifics, such as the level of education, funding, etc. (Article 33). Additionally, it reaffirms the limitations of involvement for aliens, such as, the prohibition of active or passive electoral engagement (Article 35 and 42), and balances their rights not only against the rights of persons under Georgian Jurisdiction, but primarily against the interests of the citizens of Georgia (Article 25(4)). Last, but not least, it should be taken into consideration that this normative act is a regular law and cannot dictate standards to other laws, nor can its general rules prevail over sphere-specific regulations in cases of collision. Therefore, as it should definitely be taken into consideration, the Law does not represent a final answer to specific question of this thesis, but rather, a compilation of overarching principles and rules. The following chapter discusses the specific regulations for permanent residents.

[108] For instance, the right to healthcare can be exercised by every alien on the territory of Georgia; only resident aliens are obliged to pay taxes; and only permanent residents are entitled to the right to social security in the same manner as Georgian citizens.

7 Sphere-Specific Legal Framework: Georgia and Permanent Residents

Chapter 6 pinpointed the position of permanent residents in the overarching regulations, such as the Constitution or the Law on Aliens and Stateless Persons. The logical continuation of this discussion, which this chapter revolves around, is to determine the treatment of permanent residents in specific spheres of life and, hence, the legal standards put forward by the sphere-specific regulations and judgements.

The main theme for the following sections of the thesis is exclusion: permanent residents, not unlike other types of aliens, are excluded from a number of areas of life. This exclusion takes a partial form in some areas and a complete one in others. The sphere-specific analysis delves into these legal standards.

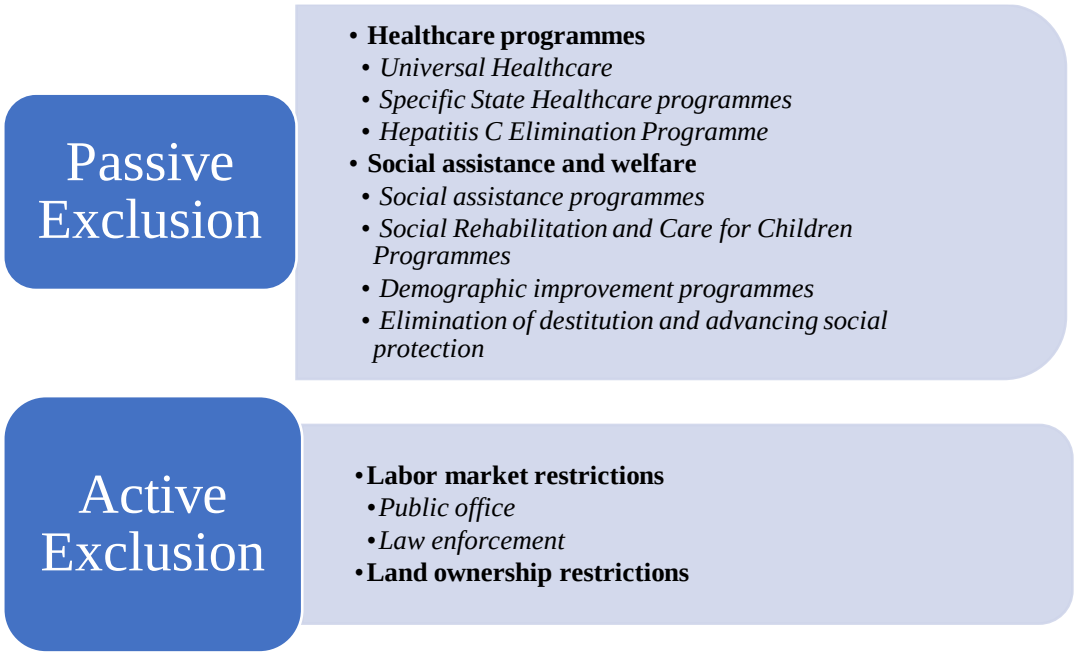

Figure 2: Types of sphere-specific regulations that exclude permanent residents in Georgia

This chapter analyses a number of laws, subordinate normative acts and judgements from Georgian legal system, which can be distinguished by their main features in two categories (Figure 2). The first category includes the services, goods, and benefits that the state positively provides for its subjects. This category of sources is referred in this thesis as "passive exclusion" and includes healthcare programmes, social assistance and benefits, and other forms of positive action. This mainly takes financial form (for instance, compensation or scholarship), but is not limited to it. This part of the analysis focuses on the issue of reserving such programmes and benefits for citizens only and the nature of permanent resident's exclusion in these areas.

The second category of regulations actively bar permanent residents from participating in certain areas of life. An example of such exclusion is reserving particular professions or activities for citizens only. This category takes many forms and is referred to in the thesis as "active exclusion." The result of both types of regulations is the same: they differentiate between citizens and permanent residents and leave the latter out of the areas and spheres reserved for the former. However, the difference between the mentioned categories, for the purpose of this thesis, is that in case of passive exclusion, the state does not bar permanent residents from participating in the area of life that they otherwise would be free to participate in, but rather abstains from providing same benefits as it does for its citizens. Active exclusion regulations do the opposite: they actively bar aliens (thus, permanent residents) from the areas of life that, without such reservations, would be open to everybody. This typology has been used in different manners,[109] but for the purposes of this thesis, they adopt the above elaborated meanings.

7.1 Passive Exclusion

This section analyses the position of permanent residents in the regulations that lay down social benefits, healthcare services or any form of aid positively provided by the state. The ambition is to explore not the normative sphere as a whole, but rather, only the regulations relevant for the discussion at hand i.e. those differentiating between persons based on their citizenship.[110]

7.1.1 Healthcare for all?

The right to healthcare in Georgia stems from the Constitution and is substantively mentioned in two provisions. Paragraph 4 of Article 5 states that "the State shall take care of human health care …" and Article 28 guarantees the right to "affordable and quality health care services …" only for citizens. The former provision, regardless of its universal language, does not belong to Chapter two, which exclusively provides justiciable human rights. Thus, it cannot qualify as a right for the purposes of this thesis (or in general) and should be understood as a policy statement. On the other hand, Article 28 explicitly limits the right to healthcare for the citizens of Georgia.

[109] For example, Amartya Sen, 'Social Exclusion: Concept, Application, and Scrutiny' 14–15.
[110] The section explores all the core normative acts of the Parliament, To identify relevant subordinate normative acts, such as Ministry or Government regulations, it refers to the State's official body for social matters, the Social Service Agency. Additionally, the thesis also draws from the Law determining the annual budget of Georgia for 2020.

Regardless, the constitutional provision guaranteeing equality before the law still applies and distinctions in this sphere still need to be justified.

Article 30 of the Law on Aliens and Stateless Persons guarantees the right to healthcare for aliens. However, there are no requirements of affordability or quality, and the provision ends with "in accordance with the legislation of Georgia." Hence, the meaning and substance of healthcare under this law is destined to be specified by other, more specific normative acts, including subordinate normative acts.

The general matters of healthcare are regulated by the Law of Georgia on Health Care,[111] which in Article 1 specifies that it regulates the relations "in the field of health care of citizens." Further in the text, the Law seems to mix the terminology. For instance, the Law employs the term "population" when it declares "universal and equal accessibility of health care" under the state healthcare programmes (Paragraph 'a' of Article 4). However, in Article 5, the Law reserves medical care under the state healthcare programmes for citizens and stateless persons of Georgia only. This citizen-exclusive approach of the Law is employed on initial stages of healthcare relations, or, in other words, on the stage of determining who gets guarantees and state aid. On later stages, the Law refers to a "patient", which is a nationality-neutral term and is defined as "a person who receives medical care." For this category, the Law prescribes the prohibition of discrimination (Article 6), the right to choose/change medical personnel or institution (Article 14), etc. Therefore, it is clear that the Law aims to differentiate between citizens and aliens (including permanent residents) in relation to receiving healthcare benefits, and the fact that the Law's non-discrimination provision is reserved for patients only confirms that.

The evident tendency of the Law to differentiate between citizens and permanent residents (definitely in favour of the former) manifests itself in the operational healthcare framework as well. There are two core government programmes in this direction: The Universal Healthcare Programme (hereinafter, the Universal Healthcare) and the annual Government Act that adopts other state healthcare programmes (hereinafter, State Healthcare Programmes). Both of these programmes are adopted through a Government act – ordinance – and, hence, represent a subordinate normative act.

[111] Law of Georgia on Health Care 1997.

7.1.1.1 Universal Healthcare

The Universal Healthcare Programme[112] was adopted in 2013 and aims to create the system of financial support to ensure affordability of healthcare services for the population of Georgia (Article 1). The particular measures provided by the same provision are: increasing geographical and financial accessibility to primary care; increasing access to ambulatory care by rationalization of expensive and high-tech hospital services; and increasing financial access to emergency and pre-planned medical care. In a practical sense, the programme assists natural persons through a form of a financial state aid – a medical voucher (Article 5). In other words, the programme is designed to provide financial assistance in healthcare for the specific list of beneficiaries and works as a form of medical or health insurance.

The Ordinance encompasses several segments, each elaborated in one of its annexes, and provides the list of possible beneficiaries for each one of them. Among these segments, the core is the Annex No. 1.1, which applies to ambulatory and stationary medical services in general and determines differing funding regimes according to their necessity and other features. However, according to Article 2 of the Ordinance, financial assistance through this Annex does not apply to permanent residents. Beneficiaries list for this segment includes citizens of Georgia, stateless persons of Georgia, persons with neutral documentation (i.e., persons residing on the occupied territories of Georgia), asylum seekers, refugees and persons with humanitarian status (Paragraph 1 of Article 1 of the Ordinance). The same goes to the beneficiaries list in Annexes 1.3 (emergency, ambulatory and stationary medical services) and 1.9 (provision of medications), which apply to special groups such as retired persons, the victims of trafficking, students, disabled persons, public artists, etc. Permanent residents are not explicitly referred to in this section but can still indirectly fall within some of this groups, for instance, permanent residents can qualify for the state pension or as socially vulnerable persons. However, in some cases, the Ordinance specifies the group by adding citizenship as a necessary requirement, for instance, it specifies that children, disabled children and persons, students should be citizens of Georgia to qualify as beneficiaries for the assistance under Annex 1.3. Annex 1.9 specifies in the

[112] Ordinance of the Government of Georgia on Certain Measures Aimed for Transition to Universal Healthcare 2013.

same way that persons with Parkinson and Epilepsy must be Georgian citizens to receive assistance.

The only segment of the Ordinance that explicitly applies to permanent residents is Annex 1.7, which deals with the management of infectious diseases in Georgia. The segment encompasses diseases such as meningitis, hepatitis, botulism, sepsis, Covid19, etc. In other words, it deals with diseases that, if not taken care of within individuals, create a threat of infecting others and, this way, potentially represent the threat to the public. Whereas all types of diseases have implications of the public, Annex 1.7 still covers the cases of direct risk, like Covid19, as compared to the other segments, which deal with the diseases of more individual nature.

The analysis of the Universal Healthcare Programme reveals that it is not designed to assist permanent residents in need. The Ordinance includes permanent residents only indirectly, through their inclusion in special groups, vis-à-vis the segments of individual nature. In the case of infectious diseases, one can assume that the aim and motivation behind the decision to include permanent residents is primarily the protection of the health of the society as a whole. The protection of the health of permanent residents individually is merely a side-effect. The general approach of this Programme and the nature of such diseases testify in favour of this assumption. In conclusion, the Programme appears not to be universal after all, at least not in the manner the term is used by the international human rights law.

It is noticeable that while it leaves out permanent residents, the Programme applies to stateless persons, asylum seekers, refugees, and persons with humanitarian status. This distinction between non-citizens can be supported by two primary arguments. Firstly, persons seeking asylum and stateless persons are subject to a separate, special international regime, governed under respective international treaties. Secondly, permanent residents still hold a legal relationship with the state of their nationality, whereas for asylum seekers, refugees and persons with humanitarian status, the failure in some aspects of this relationship is a defining element of their status. Furthermore, when this failure is often factual in the case of asylum-related groups, in the case of stateless persons there is a complete absence of this relationship. However, the distinction between different types of non-citizens is not the subject matter of this thesis, unless it is connected to defining the position of permanent residents vis-à-vis citizens.

7.1.1.2 State Healthcare Programmes

State Healthcare Programmes[113] represent an annually updated bundle of different medical programmes, which has similar general aims of "creating financial guarantees for the affordability of medical services" (Article 1) as the Universal Healthcare Programme. It has the same enforcement mechanism – financial assistance of natural persons through medical vouchers (Article 6). The main difference is that the State Healthcare Programmes take more thematic approach and reserve funding for specific issues such as mental health, management of tuberculosis or drug addiction.

These healthcare programmes, divided into 19 Annexes thematically, cover a variety of medical issues from drug addiction and mental health to rare and incurable diseases. The substance of these programmes also differs radically: whereas some of them offer tangible healthcare services (e.g. the Management of Diabetes Programme), others are awareness programmes (e.g. the Promotion of Health Programme).[114]

The chapter of General Provisions in the Ordinance states that as a general rule, the beneficiaries of these programmes are the citizens of Georgia, "unless otherwise provided by a specific programme." The Ordinance specifies that for the purposes of these programmes, under the "citizens of Georgia" it considers persons with a valid documentation of citizenship, persons with "neutral" documentation, i.e. persons who live on the territory of the occupied territories of Georgia, stateless persons of Georgia, asylum seekers, refugees and persons with humanitarian status (Article 2).

[113] Ordinance of the Government of Georgia on the Adoption of State Healthcare Programmes 2019.
[114] The thesis excludes the Programme of Examination of Persons Subject to Conscription because its objective is to ensure that defence forces are replenished by healthy forces, which does not focus on human health and wellbeing at all.

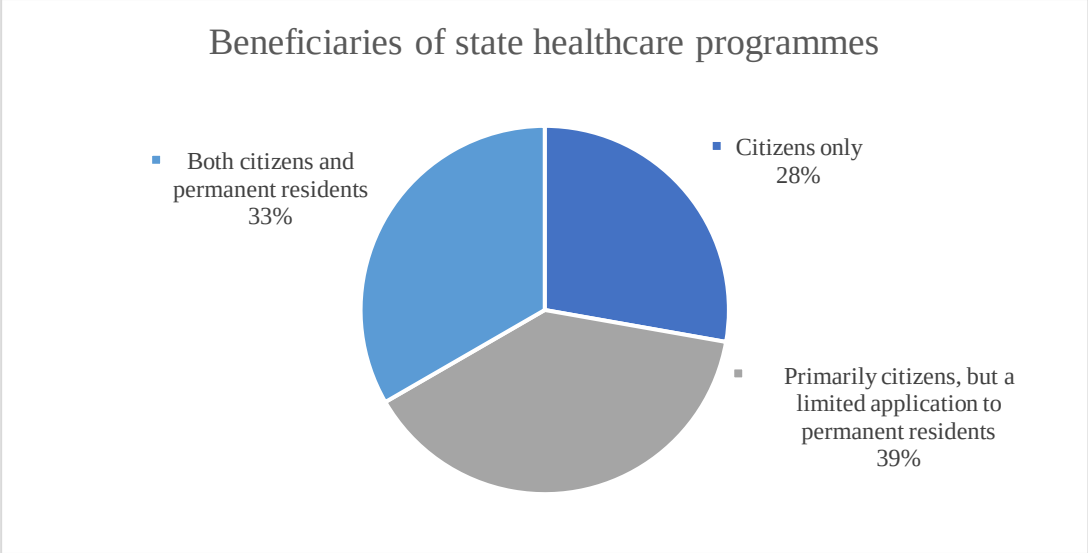

Figure 3: Beneficiaries of state healthcare programmes in Georgia

Despite the general rule, a number of these Programmes directly include permanent residents in their scope of application. Out of these 18 healthcare programmes analysed, 5 are reserved solely for the citizens of Georgia, 6 programmes include both citizens and permanent residents in their scope and 7 cover primarily citizens with a differing, but limited application to permanent residents. In this division, it is easy to notice that permanent residents are equally included in the programmes that serve to detect and treat diseases with infectious tendencies. Examples of this include the programmes of Management of Tuberculosis, Epidemiological Surveillance, and Immunization. There is also an exception from this trend as the Healthcare for Mothers and Children Programme encompasses permanent residents without having a primary focus on infectious diseases. On the other hand, the programmes reserved for the citizens bear a more individualistic nature as they target personal, rather than public, health. Examples of this include the programmes targeting mental health, drug addiction or those providing dialysis and kidney transplantation.

Additional tendencies can be identified in relation to the programmes that primarily target citizens but apply to permanent residents partially or under certain conditions. First of all, these programmes mainly provide higher standard of care i.e. more services to citizens than to permanent residents. This often materializes in the provision of medication for permanent residents whereas citizens receive ambulatory or stationary care as well. This is the case under Diabetes, Rare Diseases and Palliative Care for Incurable Patients programmes. In other cases, permanent residents are included only

under certain conditions. Such conditions are, for instance, the decision of the Commission to include them in the Management of HIV/AIDS Programme, or that they have to be in the penitentiary to receive the services under the Dialysis and Kidney Transplantation Programme, etc.

To summarize, similarly to the Universal Healthcare Programme, this bundle of State Healthcare Programmes is not designed to encompass permanent residents primarily. Surely, there are more programmes that include permanent residents in their scope than the ones exclusively designed for citizens, but the inclusion of permanent residents mainly in the programmes dealing with diseases of infectious nature, and providing them with a much lower standard of care in other programmes testify to the above observation. Overall, the distinction between citizens and permanent residents is evident and the latter receive unequally lower standard of care through the analysed programmes.

Apart from the above-discussed programmes, the separate programme of Hepatitis C Elimination has had a significant effect on healthcare in Georgia. This Programme, commenced in 2015, has been extremely successful both in screening and treating the disease that by 2015 had plagued Georgia.[115] The Ordinance[116] that brought forth the Programme aims to minimize the sickness, mortality and infection spread caused by Hepatitis C in Georgia by ensuring access to preventive measures, screening and treatment of the population (Article 1).

However, regardless of mentioning "population" in Article 1, the Programme applies to the citizens of Georgia in general. Permanent residents might also indirectly fall within the scope of the Programme if they belong to other types of beneficiaries. These groups include persons who qualify for HIV/AIDS and Dialysis and Kidney Transplantations Programmes; socially vulnerable families; persons in the penitentiary, etc. Thus, for the purposes of this thesis, it can be safely assumed that the Programme excludes permanent residents from its scope.

[115] 'Georgia's Hepatitis C Elimination Programme Setting an Example in Europe' (25 August 2017) <http://www.euro.who.int/en/health-topics/communicable-diseases/hepatitis/news/news/2017/08/georgias-hepatitis-c-elimination-programme-setting-an-example-in-europe> accessed 19 April 2020.

[116] Ordinance of the Government of Georgia on the Adoption of Hepatitis C Management State Programme 2015.

This exclusion, considered in the light of other programmes, is not surprising, but nonetheless interesting, as Hepatitis C belongs to infectious diseases. However, the reasons behind such a decision might be financial (treatment of Hepatitis C is quite costly) or related to the nature of the disease. Regardless, this programme, similarly to others discussed above, differentiates on the ground of nationality between citizens and permanent residents.

7.1.1.3 Conclusive Remarks

Healthcare is a fundamental necessity for humans, citizens and non-citizens alike, as demonstrated once again by the recent Covid19 pandemic. In this aspect of life, differentiating between persons can have literally vital implications. The necessity of healthcare programmes might well be higher for non-citizens who, broadly speaking, may not have the same safety nets, social structures and access to other spheres of life (See, for instance, Section 7.2.1.1). The exclusion of permanent residents from healthcare programmes must have weighty and substantial justification to qualify as non-discriminatory differentiation.

7.1.2 Social (Nation) State

This category of passive exclusion legislation includes legal normative acts that determine social benefits, mainly in financial form. These benefits are provided for different types of recipients to aid them through a variety of predicaments (such as disability benefits) or motivate them towards the social objective prioritized by the state (such as the benefits for the residents of high mountainous areas).

Similar to the right to health, social policies of the state derive from the Constitution, which explicitly instructs the state to "take care of strengthening the principles of social justice, social equality and social solidarity within society" (Paragraph 2 of Article 5). However, unlike the right to health, Article 5 is not provided under Chapter two, which contains rights and freedoms, and, hence, does not equip persons with exercisable or justiciable rights. Therefore, as there is no constitutional right to social benefits, the only avenue left for the excluded is to demand equal distribution of what is distributed. In other words, individuals cannot call for social benefits to be administered, but they can dispute the differentiation embedded in the application of the ones that are already provided.

7.1.2.1 The Law on Social Assistance and Subsequent Normative Acts

Georgia's legislation concerning social welfare is fragmented and there exists no umbrella normative act that encompasses all aspects. However, the Law on Social Assistance[117] represents a relatively general regulation, which aims to "provide fair, targeted and effective assistance to people by developing a regulated system of social assistance" (Article 1).

The Law encompasses 6 different types of social assistance: a) a living allowance; b) a reintegration allowance; c) an allowance for foster care; d) an allowance for family care of a person of full legal age; e) non-monetary social assistance; f) a social package (Article 6). These forms of assistance, except the last two, are of financial nature.

The most notable feature of the Law is that it is neutral in its application i.e. it applies to "persons who are *in need of special care* and are *lawful permanent residents* of Georgia, and to *deprived families* and *homeless persons*, unless otherwise provided for by this Law" (Article 2, emphasis added). In Article 4, the Law defines the meaning of persons in need of special care as: a) orphans and children without parental care; b) persons with disabilities; c) persons of full legal age with limited capabilities and without family care; d) persons without a breadwinner; e) homeless children. Therefore, if a person falls within one of the listed categories and lawfully resides in Georgia on a permanent basis, he or she is eligible for the social assistance (the type determined in accordance with his or her need) under the Law. Furthermore, the Law avoids the citizen-centred language adopted by many normative acts, which also apply to permanent residents or other non-citizen groups, and refers to its subjects as "persons" or "beneficiaries." Thus, the Law provides assistance to persons in need indiscriminately, regardless of their nationality status, which is in complete harmony with the aims and objectives of social welfare.

The neutral language and application of this Law is replicated in the subsequent Government Ordinances[118] determining the procedural rules and operational standards

[117] Law of Georgia on Social Assistance 2006.
[118] Ordinance of the Government of Georgia on Social Assistance 2006.

for each type of social assistance, as well as in the respective Minister Orders that further regulate different types of social assistance.[119]

The Ordinance[120] establishing social package is a broadly applicable and, hence, significant follow-up to the Law. Social package is a monthly monetary assistance for entitled persons (Article 2), including: persons with profound, severe and moderate disabilities; children with disabilities; persons with disabilities since childhood, who at 18 have a moderate level of disability; persons whose breadwinner passed away; receivers of state compensation; persons who have been recognized as victims of political repression; participants of military conflicts within and outside Georgia (Article 4).

The Ordinance applies to citizens and stateless persons of Georgia, and to citizens of other countries "who, by the submission of the application for social package, have lawfully resided in Georgia for 10 years on a permanent basis." The provision further elaborates that "persons with permanent residence" are the ones with a permanent residence permit in Georgia (Article 2). Article 7 of the Ordinance, which sets the rules for applying for social package, stipulates that citizens of other countries have to submit a data card (which documents person's residence in Georgia) that proves that they have lawfully resided on the territory of Georgia for the last 10 years and that they do not receive pension from their state of citizenship.

The Ordinance requires 10 years of permanent residence for eligibility, which exceeds the requirement for permanent residence permit by 4 years and equals the requirement for citizenship. Therefore, the Ordinance sets an excessive requirement of 10 years of residence, which can have implications from both sides of the coin. On the one hand, this seems to set a temporal bar of eligibility for social package at the same level as the requirement of citizenship, implying that one qualifies for this type of social benefit when he/she meets the requirements for citizenship (at least its temporal criterion). On the other hand, rather than requiring persons to obtain a formal citizenship to receive social assistance, this rule provides for a substantive evaluation standard and includes persons who meet this standard regardless of their nationality status.

[119] Order of the Minister of Labour, Health, and Social Affairs of Georgia on the Conditions and Rules of Allocation, Suspension, Renewal and Discontinuation and other Relationships Regarding the Issuance of Reintegration Allowance 2014.
[120] Ordinance of the Government of Georgia on the Establishment of Social Package 2012.

7.1.2.2 Social Rehabilitation and Care for Children Programme

Another important normative act providing assistance to socially vulnerable groups is Government Ordinance N670,[121] which establishes the annual Programme of Social Rehabilitation and Care for Children for 2020. The objective of the Programme is "the improvement of physical and social conditions and integration in the society of persons with disabilities (including children), persons of old age and children who lack family care, are socially vulnerable, homeless or under the risk of abandonment and, also, the assistance of families with children in a critical situation" (Article 1). In other words, the scope of the Programme's application includes persons with disabilities, persons of old age, children in need and families with children who are in a critical situation and provides different forms of preventive or supportive social assistance specified under respective sub-programmes attached to the Ordinance as annexes (Article 2).

There are 15 subprogrammes provided under the Programme and provide wide range of assistance. For instance, Children Rehabilitation Subprogramme aims to support children with disabilities by facilitating their inclusive development, specific rehabilitation, reinforcing their adaptive abilities, etc. The Subprogramme of Provision of Supportive Devices provides financial assistance for persons with disabilities to acquire various devices to aid their habilitation; Provision of Shelter for Mothers and Children Subprogramme provides safe shelter, food, medical support, etc. for mothers and children or pregnant women in need.

Regardless of their socially progressive objectives, the majority of subprogrammes only apply to the citizens of Georgia (Article 4). The provision further defines that for the purposes of the Programme, the meaning of "citizen" includes persons who can document their citizenship, children who are homeless or victims of violence with temporary identification documents, persons with neutral documentation, stateless persons of Georgia, refugees and persons with humanitarian status, which means that it excludes persons with permanent residence. However, there are exclusions from this general rule too: Foster Care, Provision of Services at Small Family-Type Homes and Provision of Shelter for Homeless Children Subprogrammes also cover citizens of foreign countries. These are the only subprogrammes of the Social Rehabilitation and

[121] Ordinance of the Government of Georgia on the Adoption of 2020 Programme of Social Rehabilitation and Care for Children 2019.

Care for Children Programme that apply to permanent residents, who are excluded from other benefits encompassed by the Programme.

The decision to extend the benefits of these specific subprogrammes to the citizens of foreign countries as well, seems random at first, as they, similarly to many of the Subprogrammes provided under the Programme, also aim to improve children's social situation and promote their inclusion. However, these subprogrammes concern situations where there is a need of relocation of children to foster care and small family-type homes or, in the case of homeless children, the necessity to provide shelter. In any case, the situations that trigger these Subprogrammes can be characterized as lacking family support and care for the children concerned. That is when the state steps in and takes matters into its hands, which is a completely positive approach.

Nevertheless, the state denies access to other benefits to permanent residents in need. Permanent resident children who require supportive devices to alleviate the impact of disability, or women and their children who have become victims of domestic violence and need a safe shelter are in the same situation and have the same dire needs as their citizen counterparts. In such cases, there can be other factors that bring relief – social ties, family relations, public solidarity, etc. – or there might not be any such elements and there is no self-evident distinction between citizens and non-citizens in this "lottery." One could assume that, if anybody, citizens would generally have a wider social circle and family ties and face fewer obstacles in their activities then aliens.

7.1.2.3 Citizen-Exclusive Demographic Improvement

Programmes and regulations providing support with the aim of improving demographic situation in the country or in particular parts of the country are other noteworthy sources of social assistance. In general, these programmes for families or individuals who support and promote the improvement of demographic situation by, for instance, raising multiple children or relocating/living in a certain part of the country, the repopulation of which is a prioritized by the State.

The Ordinance No. 262[122] represents the core of such programmes and aims to "improve the demographic situation in Georgia, especially in the high mountainous areas, through monetary benefits" (Article 1). The beneficiary for the assistance is a

[122] Ordinance of the Government of Georgia on the Adoption of the Targeted States Programme for Promoting the Improvement of Demographic Situation 2014.

child born in certain areas, which are "underperforming" in demographic indicators (Article 5). This benefit can be a considerable support in the Georgian reality.

The Ordinance itself does not establish citizenship status as one of the eligibility criteria. However, it delegates the authority of determining rules and conditions for administering this benefit to the Minister of Labour, Health, and Social Affairs of Georgia. The Minister in his/her Order[123] stipulates that in addition to the conditions determined by the Ordinance, individuals need to be citizens of Georgia to be eligible for the discussed benefit (Article 5). Therefore, regardless of its seemingly neutral language, the Ordinance excludes permanent residents from its application.

Another normative manifestation of Georgia's policy to improve demographic situation is the status of a "parent with multiple (4 or more) children," which entitles persons who fall within the status with various benefits. The Ordinance on the Social Protection of a Parent with Multiple Children[124] represents an example. It provides financial assistance for paying electricity bills for socially vulnerable families with multiple children. However, this seemingly neutral benefit also excludes permanent residents from its application through the definition provided by another normative act. The Ordinance No 212[125] determines that the status of a parent with multiple children can only granted to citizens and stateless persons of Georgia with 4 or more children. Consequently, placing the benefit out of the reach for permanent residents with multiple children.

The Law on High Mountainous Regions[126] also serves the aims of demographic development and is designed to provide financial and other benefits, which "ensure the well-being of persons living in high mountainous regions, raise living standards, promote employment and improve social and economic conditions" (Preamble). These benefits include: raised pensions and social package; raised salaries for teachers, doctors and nurses; monetary assistance for parents of new-born children; assistance with securing electricity and heating; tax relief for persons and business entities (Articles 4 and 5). The Law introduces the status of a "permanent resident of high

[123] Order No. 01-31/ნ of 19 May 2014
[124] Ordinance of the Government of Georgia on the Rules and Conditions for Social Protection of a Parent with Multiple Children 2018.
[125] Ordinance of the Government of Georgia on the Determination and Annulment of the Status of a Parent with Multiple Children and Creation of Data on Respective Persons 2019.
[126] Law of Georgia on the Development of High Mountainous Regions 2015.

mountainous settlement," which is a first requirement for the eligibility for the benefits mentioned above. This notion is defined as "a citizen of Georgia registered and actually living in a high mountainous settlement …" (Article 1). This legislative decision not only created a conceptual distinction on the ground of citizenship with potential impacts, but also had real implications on permanent residents who, by the time of adopting the law, had already resided in the settlements in different high mountainous areas.

This differentiation resulted in a complaint and a subsequent judgement of the Constitutional Court of Georgia.[127] The complainants, citizens of Armenia and holders of permanent resident permit in Georgia, argued that the norms requiring citizenship for qualifying for the benefits allocated for residents of high mountainous settlements were discriminatory to permanent residents.

The Court deferred to the state. It substantiated this decision by citing in support the legislative provision that citizens have a special legal relationship with the state, which is not true in the case of permanent residents. The Court stated that this legal relationship provided citizens with various guarantees, *inter alia*, the impermissibility of their deportation, whereas permanent residents, as any non-citizen, are subject to state's wide discretion in migration control, hence, there is a rational connection between allocating limited financial resources to citizens and achieving the objectives of the Law, making it a better "investment." This argument relies on no actual data or information but rather on the potential of an individual disaster, deportation of a permanent resident, which can indeed take place, but as can a death, imprisonment, or emigration of a citizen. This approach also ignores the defining nature – the permanency – of a permanent resident permit. Furthermore, the judgement connects the power of migration control and treatment of migrants in other, independent aspects of life, which is a dangerous tendency that can be replicated in more damaging ways than social benefits.

This judgement, like other normative acts on social benefits, represent perfect examples of how equality standards become a secondary consideration when regulations at hand involve the matters of traditionally citizen-exclusive areas, such as the demographic situation in the country. This topic has traditionally been framed as an identity issue –

[127] *Citizens of the Republic of Armenia - Garnik Varderesian, Artavazd Khachatrian and Ani Minasian v. the Parliament of Georgia* (n 99).

it is the demographic situation of us, "the citizens of Georgia," not of the aliens. This judgement demonstrates that as the distinctions can be unsubstantiated and unsupported from the perspective of substantial equality, they still prevail due to the deep-rooted constructs accompanying the nation-state and its "wide margins of appreciation" towards non-citizens.

7.1.2.4 Neutral Social Status as a Way In

The Georgian legislation distinguishes the welfare of vulnerable families as one of the priorities of its social policy. To achieve this aim, the Government Ordinance on Alleviation of Destitution and Advancing Social Protection[128] establishes a uniform registry of socially vulnerable families, which contains detailed information of such families and is used to plan and administer social assistance (Article 8).

Article 2 of the Ordinance defines "family" as a person or group of persons with familial or non-familial ties, who reside in a separate living space on a permanent basis and are together involved in household activities. It does not specify the citizenship status of the members of family and, hence, appears to apply to permanent residents as well.

The same is true for the receivers of the state pension. The Law on State Pension[129] declares permanent residents, along with the citizens and stateless persons of Georgia, entitled to receive state pension (Article 1). The Law requires permanent residents to have lawfully resided in Georgia for 10 years by the time they apply for pension, in the same way and with the same implications as the Ordinance on Social Package discussed above. However, the interpretation of permanent residency for the purposes of this Law is more substantive and defined as having "a lawful residence place in Georgia, notwithstanding lawful labour, education and travels outside Georgia" without mentioning or requiring a permanent residence permit (Article 4).

A subsequent Order of the Minister of Labour, Health and Social Affairs of Georgia that regulates rules of administration of state pension, requires the data card as a proof of such residence. Therefore, in order to be eligible for state pension, a foreign citizen does not need to have a formal permanent residence permit, but this condition will be assessed substantively. This approach is crucial to take into consideration, as it opposes

[128] Ordinance of the Government of Georgia on the Measures of Alleviating Destitution in the Country and Advancing Social Protection 2010.
[129] Law of Georgia on State Pension 2005.

the blanket restrictions mainly favoured by Georgian legislators and demonstrates that there can be resources for substantive assessments vis-à-vis the objectives and legal aims of the respective regulation.

Evidently, these normative acts have a citizenship-neutral language and application. However, their significant feature is that belonging to a socially vulnerable family or being a beneficiary of a state pension can "sneak" permanent residents into the scope of application of the otherwise citizen-centred regulations such as, for example, Hepatitis C Elimination Programme or Universal Healthcare. This avenue – inclusion by falling into socially vulnerable groups – is far from bringing about equality for permanent residents, but, when applicable, can be a considerable relief for the permanent residents in dire need. In this sense, this approach represents one little step in the marathon towards substantive equality, but a step nonetheless.

7.1.3 Conclusive Remarks

The analysis above reveals that, similarly to healthcare programmes, permanent residents are not completely excluded from social welfare benefits. Nevertheless, permanent residents only have access to a portion of the benefits provided for the citizens of Georgia. The legislature picks and chooses which benefits to grant to permanent residents and reasons behind these decisions are not always clear-cut. Regardless, certain regulatory tendencies can be identified in the sphere of public welfare.

The legislation, at times, is designed to be neutral both in its appearance (i.e. language employed) and application. Such laws work in the manner that is consistent with the ultimate aim of welfare measures, i.e. to bring about true equality by supporting the ones in need and compensating for the disadvantages they suffer. Such hardships, in the form of either social exclusion, financial challenges or physical ailments, do not differentiate people based on their nationality and, in principle, neither should the measures employed to alleviate them. In some cases, these neutral regulations, also bestow permanent residents with access to other programmes that would otherwise be unavailable for them, by granting them a certain status.

However, a number of regulations do not cover citizens of other states, regardless of their residence status or the level of inclusion into the society and, as the constitutional

judgement discussed above reveals, such cases of differentiation are extremely difficult to justify.

7.2 Active Exclusion

In this section, the thesis reviews the laws, subordinate normative acts and case-law that actively bar permanent residents from participating in different aspects of life. Hence, the discussion here relates to the areas of life that, without state's active interference, would be accessible for everybody. Similarly to section 7.1., this section does not aim to analyse every piece of legislation that relates to such spheres, but, rather, the ones that actively differentiate between citizens and non-citizens, mainly by reserving certain rights for the former. This includes two main spheres: exclusion from the public labour market and restriction on the ownership of agricultural land.[130]

7.2.1 Limited Labour Market for Outsiders

The public part of the labour market makes up 17% of the total workforce in Georgia.[131] Labour market is divided between self-employed and employed[132] sections, (51.7% and 48.3% respectively).[133] Therefore, the public sector, consisting of up to 300 000 persons, represents up to 35% of the workforce in the employed market. Considering that the self-employed market mainly consists of agriculture (80%),[134] which makes up just 7.2% of country's GDP,[135] it is evident that access to the employed market and the public sector within is critical for individuals who seek employment.

Before delving into particular spheres of employment, it should be underlined that only Georgian citizens can hold high-ranking public offices, whether elected or appointed. So, non-citizens cannot hold constitutional offices such as the President's, Parliament Members', and the Public Defender's office. Moreover, the positions of the President,

[130] The strategy for identification of the relevant data (i.e. normative content) in this section differed from the one employed in the passive exclusion section. Rather than reviewing all relevant normative acts, research for this section employed relevant keywords for identifying the normative content that differentiates between citizens and non-citizens.
[131] National Statistics Office of Georgia, 'Employment and UnemploymentStatistics' <https://www.geostat.ge/en/modules/categories/38/employment-and-unemployment> accessed 16 May 2020.
[132] workers who are hired by an employer
[133] 'Georgian Labour Market Analysis' (Ministry of Economy and Sustainable Development 2018) <http://www.lmis.gov.ge/Lmis/Lmis.Portal.Web/Handlers/GetFile.ashx?Type=Content&ID=a60c6446-f408-4ccc-8325-eaffcf86ecf0> accessed 7 April 2020.
[134] ibid.
[135]National Statistics Office of Georgia, 'Agriculture Sector Statistics' <https://www.geostat.ge/en/modules/categories/196/agriculture> accessed 16 May 2020.

the Prime Minister and the Chairperson of the Parliament of Georgia may not be held by a citizen of Georgia with double citizenship (Article 25(2)). Beyond the Constitution, non-citizens are barred from holding high-ranking and influential positions, for instance, in the Public Broadcaster,[136] in national sports federations,[137] and in agricultural cooperatives.[138] Non-citizens, regardless of their qualifications and insight, cannot become full members of the Georgian National Academy of Sciences[139] or hold the office of a school principal.[140] Among the whole spectrum of non-citizens, these restrictions also include permanent residents and stateless persons, even if their social integration, engagement and qualifications surpasses that of some citizens.

This citizen-centred approach indiscriminately tells all non-citizens that they are not trusted to be equipped with power. The sections below further shed light on this tendency. The first section discusses the public service that is barred for permanent residents, the second and the third sections, respectively, examine the professions in the law-enforcement/defence, and legal field. The last section delves into the prohibition on owning agricultural land, and, due to the landmark and emblematic nature of the process related to it, examines the current restrictions, as well as the legislative history of its adoption.

7.2.1.1 Nationality Matters in the Public Service

In Georgia, an important segment of the public labour market is public service, access to which is regulated by the Law on Public Service.[141] The Law determines the categories of public service, as well as its conditions and rules. Article 3 of the Law defines the scope of public service as employment in state service (service in elected or appointed positions in the state bodies that exercise legislative, executive and judicial authority, state supervision and control and defence), municipality bodies, in legal entities under public law and in other bodies that are tasked to perform public functions (such as, for instance, the National Bank of Georgia, the Office of the Public Defender, etc.). Hence, the term of public service denotes the employment in these entities performing public function and is divided into 3 main categories: public officers,

[136] Law of Georgia on Broadcasting 2005 Articles 24 and 32.
[137] Law of Georgia on Sport 1996.
[138] Law of Georgia on Agricultural Cooperatives 2013.
[139] Law of Georgia on On the Georgian National Academy of Sciences 2007.
[140] Law of Georgia on General Education 2005.
[141] Law of Georgia on Public Service 2015.

persons employed under an administrative contract and persons employed on the basis of a labour contract (Article 3(d)).

Article 27 of the Law establishes the requirements for holding the position of public officer and one of the criteria is citizenship of Georgia. So non-citizens, including permanent residents, cannot become public officers. This is not the case for administrative and labour contract-based employment, as the Law does not set such requirements. However, these 3 types of employment are not equal in terms of functions, protections and even employment opportunity.

Public service under an administrative contract is defined as "support to a public political official for the exercise by the public political official of his/her powers by giving industry/sector-specific advice, rendering intellectual and technical assistance and/or performing organisational and managerial functions" (Article 3(g)). Article 78 of the law stipulates that only assistants, advisors, or apparatus/secretariat/bureau staff of a public official can be hired through this type of employment. Such employees, as indicated by the Law, are tied to a concrete (elected) public officials and, hence, the duration of their contract cannot exceed the duration of the mentioned officials' terms of service (Article 82(2)) and the termination of the powers of the respective official causes the termination of their contract (Article 82(1)(d)).

Similarly limited is the role of the persons in public service who are hired under a regular labour contract. Article 3(f) defines their service as "powers to fulfil support or non-permanent tasks in a public institution on the basis of an employment agreement." The conditions of the work are determined by an employment contract (Article 84(1)).

Besides limited, supportive functions, simplified recruitment procedure, and, most importantly, reduced employment guarantees, the legislation puts a cap on the number of employees hired under these two types of employment agreement. Under the Law on Remuneration in Public Institutions,[142] public institutions can only hire 10% of their staff through administrative contract, and 5% through a labour contract (Article 29). In numbers, in 2018, the Civil Service Bureau reported that there were 6037 persons

[142] Law of Georgia on Remuneration in Public Institutions 2017.

employed through labour contracts and 668 through administrative contracts, as compared to 38009 public officers employed in public service.[143]

In contrast with other types of public service, the public officer position entails indefinite appointment on a full-time basis and exercise of public powers as a principal professional activity (Article 3(e)). Additionally, the public officer position comes with additional guarantees such as a leave for professional development, entitlement to be transferred to a position compatible with the state of health, death or disability allowances and, most importantly, the guarantee that a public officer can be dismissed only if there are grounds provided under the Law.

In sum, the public officer position is a primary type of public service employment in terms of functions, guarantees and protections. It also represents a larger labour market than other types of public service under the Law on Public Service. In comparison, other types of public service employment are characterized by their supportive and supplementary functions, as well as temporary nature of contracts and the lack of guarantees. At the same time, they occupy an insignificant fraction of the public labour market in Georgia.

By blocking access to the public officer position for permanent residents, the state leaves them out from a large part of public service labour market that equips partakers with significant employment guarantees and a respectable status. Most importantly, being barred from the public officer position entails not having access to the exercise of public functions and, thus, to the ability to influence and partake in public decision-making, even on a lower level. In a nutshell, the implication (and probably the explicit state justification) of restricting public officer position to non-citizens, regardless of their integration, connections with the state, qualifications, and competence, is that citizens of other countries cannot and will not be trusted with public functions, even when the influence on decision-making is minimal and the position mainly entails the implementation of the decisions of high-ranking officials.

7.2.1.2 No Place Among Guards!

This section considers the laws regulating the matters of "guarding" the state i.e. law-enforcement internally and defence externally. There is no uniform definition of law

[143] '2018 Report on the Activities of the Civil Service Bureau of Georgia' (Civil Service Bureau of Georgia 2018) 29–48 <http://www.csb.gov.ge/media/2438/964872018.pdf> accessed 7 April 2020.

enforcement in Georgia, but functionally it includes Police, Prosecution, Investigation Service of the Ministry of Finance, Military Police, State Security Service of Georgia, State Security Service, and State Protection Service.[144] Not surprisingly, this sphere is completely citizen-exclusive and does not permit the involvement of anybody without citizenship. Some professions discussed in this section, such as police officers, are also considered as public officers under the Law on Public Service discussed above. However, compiling the law-enforcement and defence sectors under one section is still important, regardless of the duplication, as it gives a complete picture of the sector.

The regulation of military service[145] distinguishes two types of military service, compulsory and voluntary (Article 2(1)). The Law stipulates that stateless persons of Georgia are liable for compulsory military service similarly to citizens (Article 5(1)) and that the provisions of the Law apply to persons permanently residing in Georgia, who are not citizens (Article 5(3)). However, it also talks about aliens (citizens of other countries) and allows them to enlist in the military service per their request, but only if the Prime Minister of Georgia decides so (Article 5(2)). The wording of the Law is unclear in that it is not evident whether permanent resident non-citizens are liable for compulsory military service (one of the provisions of the law) or if the general provision on non-citizens applies to them (i.e. Article 5(2)). However, it seems that the latter statement is true, as the subordinate normative acts on compulsory military service only talk about citizens and the special procedure for aliens specifically emphasizes the expression of their will as the basis of their military service.

The provision that lets aliens request participation in military service seems more progressive as it provides a chance for permanent residents to be part of the military service. However, due to its special process that requires a decision from the highest-ranking official in Georgia, this inclusion seems directed at extremely special cases, where the benefits of a foreign national's talent in the military arts are so grand for the Georgian state that the Prime-Minister of Georgia can be bothered and involved. Therefore, this is a utilitarian approach and, most likely, has nothing to do with the aims of integration or equality.

[144] Law of Georgia on the Special State Protection Service of Georgia 1996; Law of Georgia on State Security Service of Georgia 2015; Organic Law of Georgia on Prosecution 2018; Law of Georgia on Military Police 2007; Law of Georgia on Investigation Service of the Ministry of Finance of Georgia 2009; Law of Georgia on Police 2013.
[145] Law of Georgia on Military Duty and Military Service 1997.

In addition to representing a considerable labour market, law enforcement and defence sectors carry with them an important symbolic meaning for integration and participation in a particular society. Holding the position of police officer implies that an individual is entrusted with protecting the security and peace in the society and implementing and enforcing the law and is trusted to legally use force when necessary. Accordingly, being barred from such positions has implications of not being allowed to be more than a mere subject of the law. Permanent residents, in this sense, are not trusted to hold such responsibilities regardless of their level of integration, competences and qualifications.

7.2.1.3 Not Allowed in the Courtroom!

Besides being barred from participating in enforcing the law or defending the country, permanent residents are also not allowed to perform any functions in the courtroom. Starting from the most obvious exclusion, similar to other high-ranking state offices, non-citizens are indiscriminately barred from holding the position of a judge. The Constitution[146] itself introduces the criterion of citizenship of Georgia for the candidates to be appointed at the Constitutional Court (Article 60(2)) and at Common Courts of Georgia (Article 63(6)).

Given that permanent residents are not allowed to become public officers, it is no surprise that they are also barred from building a career at the prosecution[147] and, hence, cannot represent the state in criminal proceedings. Furthermore, neither can they represent the accused, or parties in civil proceedings, as, according to the Law on Lawyers,[148] the profession of a lawyer in Georgia can only be practiced by a citizen.

The lawyer (or to use the Georgian term, "advocate") profession in Georgia is a regulated profession in the sense that to become a professional lawyer, one needs to pass the Bar Exam and become a member of the Georgian Bar Association (Article 1(2)). These requirements can be understandable, as the profession entails high ethical responsibilities, the violation of which can have detrimental implications for individuals, as well as the legal procedure in general. However, the lawyer's role is to represent private persons (clients) in legal relationships, criminal or civil (Article 2) and it is a "free profession answering only to the law and professional ethical norms" (Article 1(2)). In this sense, the profession of a lawyer is formally and functionally

[146] The Constitution.
[147] Organic Law of Georgia on Prosecution Article 34(3).
[148] Law of Georgia on Lawyers 2001.

independent from the State and the Government. Moreover, as a rule, the State and a professional lawyer appear on the opposite sides of the courtroom and, logically, the lawyer profession should not have the same limitations as those established for the public officer position. Nonetheless, citizenship is a principal qualification criterion for both.

The argument that the lawyer profession is substantially independent from the state does not imply that establishing citizenship as a requirement is justified for the position of public officer, but, rather, that the profession of a lawyer differs so substantially from it that the same logic and legitimate aims cannot apply. At the same time, it should be underlined that the lawyer profession has a significant public importance in many ways, *inter alia*, in maintaining the fairness of judicial proceedings. However, it is not evident how the objectives, principles and functions of this "free" profession justify the blanket exclusion of permanent residents, regardless of their competences or qualifications.

On the other hand, the implications of such an exclusion are vast. Beyond the evident economic effects of closing yet another prestigious employment opportunity to permanent residents, this limitation comes down to depriving non-citizens of any agency in the legal field, making them mere subjects of the law who are not trusted to practice it from any influential side, no matter how minimal this influence is. The legislation restricts hiring non-citizens even as judicial clerks[149] or court bailiffs.[150] Therefore, in any hypothetical or real-life judicial hearing, permanent residents can only sit in the seat of a defendant, party or an attending public, i.e. in a passive role devoid of any real influence.

7.2.2 Not on Sale for Aliens!

In 2017, the Constitution of Georgia was amended substantially.[151] Among politically controversial provisions of the amended Constitution,[152] were two restrictive provisions that were ironically incorporated in the Chapter providing rights and freedoms: the definition of marriage as union between a man and a woman (Article 30(1)), and a prohibition of agricultural land ownership for non-citizens (Article 19(4)).[153]

[149] As they are public officers under the Law on Public Service
[150] Law on Common Courts Article 59 (4).
[151] Civil.ge, 'New Constitution Enters into Force' (17 December 2018) <https://civil.ge/archives/271293> accessed 21 May 2020.
[152] 'New Constitution of Georgia Comes into Play as the Presidential Inauguration Is Over' (*Agenda.ge*) <https://agenda.ge/en/news/2018/2674> accessed 21 May 2020.
[153] The Constitution.

These provisions corresponded with exclusionary campaigns and initiatives of the extreme right groups in Georgia,[154] especially the latter on agricultural land that had been advocated through several violent marches.[155] This restriction was a peculiar one in that it transcended a specific political power: it was first statutorily introduced by the ruling party before 2012. Moreover, the exclusion of non-citizens from owning agricultural land had so persistently been pushed and advocated that it survived defeat three times at the Constitutional Court and still won the "war" as it advanced to be incorporated into the Constitution.

This constitutional battle started in 2012 with the case of *Heike Cronqvist v. the Parliament*,[156] which, although not concerning the right to equality and non-discrimination, revolved heavily around equality issues, especially between citizens and resident non-citizens. The case was triggered by the Law of Georgia on ownership of agricultural land[157] that prohibited the ownership of agricultural land by foreign nationals, which were also obliged to transfer the title within six months in case of obtaining ownership on the agricultural land. The Parliament explained that the aim of the restriction was to prevent the purchase *en masse* of the agricultural land by the nationals of "richer countries."[158] The state noted that the restriction had "legitimate aims," meaning economic security, protection of the environment, proper development of the agrarian structure and security of the state. These aims were rejected by the Court, which stated that, for instance, there was "no logical link between the disputed norm and legitimate aims provided by the respondent."[159]

Considering the above, the Court did not have difficulty finding that the disputed norms restricting non-citizens' property rights were unconstitutional. However, the noteworthy part of the judgement was the discussion on the position of resident non-citizens.[160] The Court elaborated on the distinct standing of non-citizens residing in

[154] Tamta Gelashvili, '"Georgian Pride World Wide:" Extreme Right Mobilization in Georgia, 2014-2018' (The University of Oslo 2019) 3 <https://www.duo.uio.no/handle/10852/69689> accessed 21 May 2020.
[155] For example, 'Georgian Nationalists "Block Foreigners from Public Service Hall"' (*OC Media*, 11 December 2018) <https://oc-media.org/georgian-nationalists-block-foreigners-from-public-service-hall/> accessed 21 May 2020.
[156] *Citizen of Denmark - Heike Cronqvist v. the Parliament of Georgia* (n 1).
[157] This version of the law was annulled in 2019 with the adoption of the new law.
[158] *Citizen of Denmark - Heike Cronqvist v. the Parliament of Georgia* (n 1) I–12.
[159] ibid II–70.
[160] ibid II-92–101.

Georgia granted by the Constitution[161] and emphasized that, due to "a unique connection with the state"[162] Non-citizens residing in Georgia (as compared to non-residents) enjoy the same rights and freedoms as the citizens of Georgia, unless the restriction stems from other provisions of the Constitution. This consideration is significant as it lays the foundation for arguing why laws, such as the one declared void through this judgement, should take into consideration the drastic diversity of the group united under the umbrella term "non-citizens" and regulate in accordance with the context for each sub-group within.

This judgement preceded and laid foundation for two following decisions of the Court related to similar restrictions on the ownership of agricultural land. Both of these decisions[163] were issued in the form of a ruling, meaning that the norms disputed therein were declared unconstitutional for containing the same substance as the norm declared unconstitutional before. In this case, such a norm was the one annulled in the *Cronqvist* case.

This "stand-off" between the Constitutional Court and the Parliament revealed many peculiar tensions and dynamics. First of all, the objective of excluding non-citizens from owning agricultural land was so critical that the state repeated it twice in slightly different forms after the initial judgement and, at the end, culminated it with ascending the provision to the constitutional level. Secondly, the review by the Court disclosed yet another example of the superficiality and vagueness of state arguments employed to justify limitations for non-citizens and, in this light, revealed the arbitrary nature of the above described persistent effort. Thirdly, although the situation was exceptional due to the demonstrated lack of respect and collegiality from the ruling power to the Constitutional Court, this case still showed the limitations of domestic human rights regime. The government, regardless of the clear message that the concrete provision contradicted the human rights regime, found a way to embed it into the Constitution, the foundational act for the legal system of Georgia.

[161] Article 33 in the amended Constitution; Article 47 (the old version of the Constitution) as cited in the Judgement
[162] *Citizen of Denmark - Heike Cronqvist v. the Parliament of Georgia* (n 1) II-94–95.
[163] *Citizen of Austria Mathias Huter V the Parliament of Georgia* [2014] Constitutional Court of Georgia No. 1/2/563; *Citizen of Greece Prokopi Savvid and Diana Shamanid V the Parliament of Georgia* [2018] Constitutional Court of Georgia No. 3/10/1267,1268.

The provision prohibiting the ownership of agricultural land to non-citizens is included at the end of Article 19 of the Constitution that guarantees the right to property and it is formulated as "as a resource of special importance, agricultural land may be owned only by the State, a self-governing unit, a citizen of Georgia or an association of citizens of Georgia." Read in light of Chapter 2 of the Constitution (that establishes human rights and freedoms), this restriction looks out of place, because no other provision imposes a direct restriction on the scope of the right. This constitutional norm on agricultural land ownership was translated into the Organic Law, that further elaborates on the extent of the restriction.[164]

In a nutshell, non-citizens, including permanent residents, are not allowed to purchase agricultural land, which has a number of implications for permanent residents. First of all, it has a pure economic effect of placing a considerable part of real (immovable) property market off-limits for permanent residents, who, due to their close connections (temporal or social) to the country, are likely to be engaged in economic and financial relations in Georgia. The prohibition bars them from moving to rural areas and undertaking farming. Accordingly, permanent residents already living in rural areas would find themselves in economic stagnation as they would not be able to take up or expand their farming activities. Considering that the self-employed market comprises more than 50% of the labour market in Georgia and more than 80% of this market is in agriculture, mostly in the form of small household enterprises, the extent of economic and financial exclusion established by this restriction is substantial.

Moreover, as blanket and indiscriminate towards "aliens" as it is, the restriction equates permanent residents with other representatives of this large group, for instance, with persons who have never visited Georgia. This approach ignores permanent residents' level of integration and links with the country. In this regard, permanent residents too fall in the rhetoric that non-citizens represent a threat or danger towards legitimate public interests, such as, for instance, economic or general security in the country. At the same time, as agricultural land is declared an "exhaustible resource of particular importance,"[165] the restriction on its ownership flags the excluded, including permanent residents, as the ones that cannot be trusted with this responsibility, as compared to citizens.

[164] Organic Law of Georgia on Agricultural Land Ownership 2019.
[165] ibid Preamble.

Last, but not least, there is no protection against exacerbating this situation, if, for example, the government decides to expropriate existing agricultural land from every non-citizen. In this case, the Constitutional right to property would not apply, as the formulation of the provision (Article 19) excludes non-citizens. Therefore, permanent residents' right to property on agricultural land would be unguarded against potential populist whims of governing powers.

7.2.3 Conclusive remarks

Active exclusion spheres discussed in section 7.2 elucidate the extent of exclusion that permanent residents are subjected to in their employment or economic activities. In the sphere of employment, they are banned from holding any position or acquiring any profession that has influence on the public decision-making or is tasked with implementing the decisions made. This principle overflows even in the private sphere, where the "free" and independent profession of a lawyer is out of reach for non-citizens, including permanent residents. Furthermore, permanent residents are also constitutionally barred from stably participating in the agricultural sphere.

These restrictions, added together, constitute an exclusionary regime in the economic sphere that declares a large part of the economic or labour market in Georgia off-limits for permanent residents. At the same time, as the developments discussed in relation with the restrictions on agricultural land reveal, such restrictions rarely have substantiated argumentation when examined through the lens of human rights. The following chapter studies the position of permanent residents in the international human rights framework and briefly outlines the main standards that apply to domestic legal systems, putting special emphasis on the European Convention on Human Rights.

8 Permanent Residents in the International Human Rights Law

The case study of Georgia reveals multi-faceted exclusionary regulations that have either overcome or not been yet addressed through the domestic human rights regime. In either case, domestic human rights systems have various disadvantages and limitations, well-illustrated by the circumstances around agricultural land restrictions in Georgia. However, domestic human rights systems are supplemented, influenced and, to some extent, dictated by the applicable international human rights laws, which establish an overarching minimum threshold by binding states through international treaties.

This chapter maps out the standards and approaches of the most authoritative instruments vis-à-vis the general category of non-citizens, in which the core subject of this thesis, permanent residents, fall. Furthermore, analysing international human rights instruments and exploring their limitations offers the general impression of where the international law places the non-citizen and how much free reign the states are afforded. As it concerns a majority-minority issue, this conversation inevitably revolves around the question of equality and non-discrimination. The discussion sets out from the broad principles of the International Bill of Human Rights,[166] briefly touches upon other relevant human rights treaties and, finally, narrows down to specific rules and operational standards of the European Convention on Human Rights.[167]

8.1 The International Bill of Human Rights

8.1.1 The Universal Declaration of Human Rights

The Discussion on the human rights of non-citizens and the standards the international law has developed towards them starts with the UDHR as the foundational document for all international (or domestic) human rights.[168] The principles brought forward by the Declaration also represent the theoretical and methodological basis for the analysis in this thesis.

The UDHR was adopted in 1948 in the immediate aftershock of the WWII and the inconceivable atrocities it shed light on. The Declaration – the post-war 'weapon' in

[166] It consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights
[167] European Convention on Human Rights 1950 34.
[168] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013) 23 <www.jstor.org/stable/10.7591/j.ctt1xx5q2> accessed 13 March 2020.

this "struggle between value systems"[169] – establishes the dignity and equality of all humans as the cornerstone for the world order with "freedom, justice and peace."[170]

Although human rights have always been accompanying human race in one form or another,[171] the UDHR signified the first major agreement among a large number of sovereign states to guarantee inalienable rights for its subjects to live in a peaceful, free and equal world.[172] The UDHR is not a directly binding document that imposes concrete legal obligations to its signing states.[173] The Declaration consists of a Preamble and 30 Articles detailing "a short but substantial list of human rights."[174] The rights and freedoms under the Declaration derive from and protect a wide array of civil, political, economic, social and cultural areas of life.

The Preamble of the UDHR provides for the context of adopting the Declaration, and lists the core features of human rights, including their indiscriminate, equal application to all humans. Article 1 of the Declaration further develops this argument by stating that "all human beings are born free and equal in dignity and rights." This emphasizes that the principle of equality (together with human dignity) is not only a separate human right, but lays the very foundation of this concept of human rights.

Article 2 of the Declaration provides a more concrete, operational principle of non-discrimination. It proclaims that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind …" The provision names a number of grounds specifically discriminating against which is prohibited by the Article, namely, "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[175] Here, the UDHR prohibits discrimination against persons based on their "national .. origin." the Declaration also refers to nationality as a separately protected right in Article 15, stating that "Everyone

[169] William A Schabas (ed), 'Introductory Essay: The Drafting and Significance of the Universal Declaration of Human Rights', *The Universal Declaration of Human Rights* (Cambridge University Press 2013) 73.
[170] Universal Declaration of Human Rights, Preamble
[171] Schabas (n 169) 71.
[172] Universal Declaration of Human Rights, Preamble and Articles 1 and 2
[173] Although, there is a discussion against simply distinguishing the treaties of the International Bill of Human Rights as binding and non-binding, as it downplays the „subtlety of their relationship." See: Schabas (n 169) 115–119.
[174] Donnelly (n 168) 26.
[175] Ibid.

has the right to a nationality" and "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

The term 'nationality' often denotes 'citizenship;'[176] for example, the UNHCR Handbook on Nationality and Statelessness uses these terms interchangeably.[177] Additionally, the European Convention on Nationality[178] defines nationality as "the legal bond between a person and a State". Hence, nationality, as the international form of legal bond between a state and an individual, may take different forms in national legal systems, citizenship being one of them. This thesis uses the terms interchangeably as well.

The language of Article 2 refers to "national … origin" and not nationality *per se*, which might be a source of additional confusion. However, Article 2 is an open-ended provision as it ends with "… or other status," leaving room for including other grounds which persons cannot be discriminated against. Therefore, non-citizens (obviously including permanent residents) fall within the scope of Article 2 and, hence, cannot be discriminated against according to the Declaration.

Whereas Article 2 of the UDHR is limited to the substance of the Declaration,[179] Article 7 stipulates the principle of equality before the law, hence, reaching beyond the scope of the Declaration. The relationship between these two articles is close, but they are not identical. Article 2 determines an overarching general principle, whereas Article 7 represents a more operational provision for national realities of states.[180] In summary, the UDHR, on the one hand, protects non-citizens from discrimination vis-à-vis the realization and protection of the rights and freedoms under the UDHR itself, and, on the other, it guarantees equality before the law (may it be international or national) as a separate fundamental human right. This distinction is replicated in many international and domestic human rights instruments.

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[176] Ineta Ziemele and Gunnar G Schram, 'Article 15.' in Asbjorn Eide and G Alfredsson (eds), The universal declaration of human rights : a common standard of achievement. (Kluwer Law International 1999), 298.
[177] Carol A Batchelor, Philippe Leclerc and Marilyn Achiron, *Nationality and Statelessness: A Handbook for Parliamentarians* (Inter-Parliamentary Union 2005).
[178] European Convention on Nationality (6 November 1997 CoE ETS No.166)
[179] meaning that if the case of discrimination (e.g on the ground of citizenship) falls beyond the scope of rights and freedoms envisaged by it, the UDHR does not protect persons against such a discrimination
[180] Sigrun Skogly, 'Article 2' in Asbjorn Eide and Guðmundur S Alfreðsson (eds), *The universal declaration of human rights : a common standard of achievement.* (Kluwer Law International 1999) 80.

Apart from the standards of equality, two features of the UDHR are of distinctive relevance for this thesis. First is spelled out in Article 29 of the UDHR, which establishes the earliest form of balanced limitation of human rights (in other words, proportionality).[181] This provision, apart from being a fountainhead for modern human rights adjudication tests, carries a defining meaning for the nature of human rights and limitations. It places human rights "above or antecedent to the state"[182] and determines "the rights and freedoms of others" as the only interest that can overweigh the balance against individual human rights. This implies that under the UDHR, differential treatment of non-citizens can only be justified if there is a genuine human rights argument on imposing restrictions on them or granting privileges to citizens. Article 29 carries a defining role for the approach and assessment standard this thesis adopts as it restrains arbitrary restrictions on equality and requires properly substantiated, contextualized justifications. In this sense, the provision can also be seen as the early manifestation of substantive equality principles.

The second important principle introduced by the UDHR is that, building on the philosophy of natural rights,[183] it declared that human rights are inherent to human nature and the role of the state is not that of a source, but rather of their implementer.[184] Universal in this, theoretical sense (that it applies to all humans, for the sole reason that they are human), the UDHR could also be considered universal as it has been accepted by virtually all states.[185] The meaning and implications of the universality of human rights has been the subject for heated scholarly discussions, especially when countered by cultural relativist arguments, which uses cultural values as the main "source of the validity of a moral right or rule."[186] However, for the purposes of this thesis, the principle of universality is referred and invoked to counter particularistic manifestations of state sovereignty that arbitrarily divide humans based on citizenship status.

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[181] "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."
[182] Johannes Morsink, 'The Philosophy of the Universal Declaration' (1984) 6 Human Rights Quarterly 309, 333.
[183] ibid 332–334.
[184] ibid 333.
[185] Donnelly (n 168) 26.
[186] Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 Human Rights Quarterly 400, 400; For furtherLouis Henkin, 'The Universality of the Concept of Human Rights' (1989) 506 The Annals of the American Academy of Political and Social Science 10.

The foundational concepts of universality, equality and dignity, as well as operational principles of non-discrimination and proportionality power the modern system of human rights protection on international and domestic levels. The thesis examines whether in practice these principles live up to the ideals of the UDHR, in which human equality and dignity have an absolutely central status. The idealistic provisions of the UDHR have been translated into operational instruments, below Sections 8.1.1 and 8.1.2 discuss two of the most significant such instruments.

8.1.2 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) entered into force in 1976 and in contrast with the UDHR, the rights and freedoms of the ICCPR impose corresponding obligations on the state parties.

According to Article 2 Paragraph 1, state parties undertake to guarantee the rights under the Covenant to their subjects[187] without discrimination of any kind, which protects permanent residents from discrimination vis-à-vis the rights within the scope of the Covenant. Article 26 of the ICCPR establishes the requirement that law shall protect individuals on an equal basis, without discrimination.

As mentioned above, the ICCPR is a binding treaty and it is only logical that it has a treaty body – the Human Rights Committee (HRC) – which supervises the adherence of the ICCPR standards by the state parties. The HRC has defined the term discrimination "to imply any distinction, exclusion, restriction or preference which is based on any ground … and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[188] Furthermore, the HRC has also indicated that Article 26 of the ICCPR, in contrast with Article 2, is not limited to the rights and freedoms under the ICCPR but covers the content of any kind of legislation.[189]

Therefore, the ICCPR anti-discrimination regime protects non-citizens from discrimination in (a) the realization of the rights and freedoms under the Covenant, and (b) the national legislative practices without such a limitation. Hence, even though the Covenant does not cover social welfare, it still requires its state parties to legislate on

[187] „all individuals within its territory and subject to its jurisdiction"
[188] UN Human Rights Committee (HRC), 'CCPR General Comment No. 18: Non-Discrimination' (1989) para 7.
[189] ibid 12.

the matter without any discrimination to non-citizens or non-nationals. The HRC has repeatedly found admissible cases concerning such rights as retirement pension, unemployment benefits, disability pensions, health insurance, education, etc.[190]

However, the HRC also notes that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."[191] Hence, it provides an assessment test for discrimination cases. Although, the HRC's jurisprudence has not been consistent in this matter,[192] it is clear that the ICCPR has adopted the UDHR standard of assessment for differentiation – only others' rights and freedoms can justify any kind of distinction, and, again, mere reference to "state interests" will not justify differentiation under the ICCPR.

Furthermore, the HRC has also issued a General Comment dedicated to the position of aliens,[193] where it explains that "In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness."[194] However, there are also rights reserved only for citizens such as the ones provided in Article 25 of the ICCPR: the right to take part in public affairs; the right to vote and be elected; and the right to have access to public service.[195] The comment pays homage to the exclusive sovereign right of states to decide on entry and residence of aliens, but also notes that in some cases where "considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise," aliens might still be protected by the Covenant in this regard too.

This brief analysis of the ICCPR standards shows how the voluntary and declaratory standards of the UDHR were translated into an obligatory and operational instrument. In this sense, it is easy to notice how, as compared to the Declaration, the weight of states increased in the vocabulary and standards of the ICCPR and how the restraint placed on their decision-making relaxed proportionately. This sacrifice of idealism to make human rights work in practice in the reality of sovereign states can also be seen

[190] Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd ed, Oxford University Press 2005) 686.
[191] UN Human Rights Committee (HRC) (n 188) para 13.
[192] Joseph, Schultz and Castan (n 190) 700.
[193] UN Human Rights Committee (HRC), 'CCPR General Comment No. 15: The Position of Aliens Under the Covenant' (1986).
[194] ibid 1.
[195] ibid 2.

in other international instruments, such as the ECHR, which cede certain areas of life (access to civil service) to absolute state discretion.

8.1.3 The International Covenant on Economic Social and Cultural Rights

The ICESCR entered into force in 1976 and imposes a concrete obligation to protect and fulfil the rights and freedoms on state parties. The requirements of the ICESCR are more lenient than the ones of the ICCPR, and it is logical in practical terms too – whereas the ICCPR mostly requires states to abstain from interference or protect the vital aspects of humanity such as life, integrity, dignity, etc., the ICESCR mainly requires active action (and finances) from states in the areas of economic and social wellbeing of humans. Accordingly, the principle of equality plays a foundational role for the ICESCR, as its content can arguably be perceived as the codification of the principles of substantive equality, trying to promote social and economic wellbeing of humans all around the world.

Article 2, paragraph 2 of the ICESCR establishes the same anti-discrimination regime as the ICCPR and the UDHR, with a similar list and an open-ended provision.[196] However, interestingly, paragraph 3 of the same article establishes a permitted exception from the rule. Namely, that "developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."[197] Therefore, it clearly allows for what in other cases would be a blatant discrimination against non-nationals, if the state concerned is a developing country.

The Committee on Economic, Social and Cultural Rights (CESCR) has defined discrimination in the same way as the HRC, adding that it can be "direct or indirect" to the definition.[198] Apart from this, the CESCR has further determined that discrimination can be formal or substantive, the latter sometimes requiring adoption of "special measures to attenuate or suppress conditions that perpetuate discrimination."[199] The ICESCR has adopted a comprehensive model of anti-discrimination, not limited to the public sphere[200] and encompassing systemic discrimination as well.[201]

[196] The ICESCR, article 2 para. 2
[197] Ibid, para. 3
[198] General Comment 20, The Committee on Economic, Social and Cultural rights, (2 July 2009, E/C.12/GC/20) para. 7
[199] General Comment 20, para. 9
[200] General Comment 20, para. 11
[201] General Comment 20, para. 12

Notably, the CESCR has determined that nationality as a discrimination ground does not fall within "national origin" but rather within the "other status" category.[202] This must have defining importance for the UDHR and the ICCPR as well, as these three treaties are interdependent and supplement each other.

It is obvious that the ICESCR protects non-citizens from discrimination of any kind, including them in its progressive equality regime. Non-citizens, under the ICESCR, should have their economic, social and cultural rights protected, respected and fulfilled without direct or indirect, formal or substantive, incidental or systemic discrimination and, in some cases, the situation might require states to take positive measures in their benefit. With this systemic, holistic approach, the ICESCR advances the substantive approach and understanding of equality and has the potential to push for progressive standards in the areas neglected by other instruments. However, non-citizens are also the only group singled out in the exception clause, the first ones to be thrown overboard in cases of scarce resources. With this provision, the ICESCR recognizes the unwritten hierarchy between citizens and non-citizens, reflecting historical perceptions and sending a malicious message to the future at the same time.

8.2 Other International Instruments

The instruments discussed above deal with the general issues related to position of non-citizens, for instance, questions of discrimination and equality. However, other instruments establish the human rights requirements which are more specific to particular types of aliens across the taxonomy, or the area of life. Example of the former is the 1951 Refugee Convention[203] which addresses the matters of asylum, and the latter category contains the ILO Migrant Workers Convention.[204] This thesis briefly reviews the instruments that are relevant for permanent residents.

The Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live[205] draws heavily on the legacy of the UDHR and likewise founds the substantial part of the text on Preamble's principles of inherent dignity, equality and non-discrimination.[206] Major distinction from the UDHR is the frequency

[202] General Comment 20, para. 30
[203] UN General Assembly, '1951 Convention Relating to the Status of Refugees' (1951)
[204] ILO, 'Migrant Workers (Supplementary Provisions) Convention (No. 143)' (1975)
[205] UN General Assembly, 'Declaration on the Human Rights of Individuals who are not nationals of the country in which they live' UNGA res 40/144 (1985)
[206] Ibid Preamble

of the term 'state' employed in the text which is the fruit (or the source) of state's increased role in this Declaration. Under Article 4 "aliens shall observe the laws of the State in which they reside or are present and regard with respect the customs and traditions of the people of that State." Therefore, not only states have obligations towards aliens, but aliens too owe to states. Such counterbalancing relationship is evidently absent from the UDHR.

The instrument is of declaratory nature and applies to all types of aliens or "any individual who is not a national of the State in which he or she is present" (Article 1). The Declaration requires states to provide certain rights to all aliens. Such rights include, but are not limited to, the right to life and security of person; the right to be equal before the courts; the right to retain their own language, culture and tradition (Article 5(1)). However, the significance of this instrument is that it distinguishes between alien categories and provides additional rights for aliens who lawfully reside in the country. These rights include labour rights (safe and healthy working conditions, to fair wages and equal remuneration); freedom of association; and the right to health protection, medical care, social security, social services, education, rest and leisure (Article 8(1)).[207]

However, there is a regional framework in the form of the European Convention on Human Rights (ECHR), which applies to Georgia, sets out operational standards and provides assessment methods for the domestic legal system, which are central to this thesis. The content of the ECHR and its legal implications for Georgia are detailed below.

8.3 The European Convention on Human Rights

The Convention for the Protection of Human Rights and Fundamental Freedoms, or the European Convention on Human Rights (hereinafter the ECHR), was adopted on 5

[207] Additionally, there exist frameworks covering the rights of migrant workers such as International Convention on the Protection of All Migrant Workers and Their Families, or ILO Migration for Employment (C097) and Migrant Workers (Supplementary Provisions) Convention (C143). However, Georgia has not ratified or even signed any of these instruments and, at the same time, they fall beyond the focus of this thesis. As also do the instruments which protect the rights in other areas or of other subjects but have an intersectional dimension with the rights of aliens or non-citizens. Example of such instruments would be the Convention on the Elimination of All Forms of Racial Discrimination

November 1950 and entered into force on 3 September 1953 with 10 ratifications.[208] Nowadays, the Convention covers 47 countries that are members of the Council of Europe and protects more than 830 million persons in their jurisdiction.[209] It followed in the footsteps of the then-freshly adopted UDHR and the influence is obvious from the very beginning of the ECHR – it invokes the UN Declaration two times in the Preamble and refers to "justice and peace in the world" as an implied ultimate objective.[210]

Preamble of the ECHR notes that the mentioned European countries undertake "the collective enforcement of *certain of the rights* stated in the Universal Declaration."[211] Accordingly, the ECHR's core text deliberately[212] lacks any of the social, economic or cultural rights provided by the UDHR.[213] The reasons behind such a decision are not quite clear, but some scholars theorize that it might have been caused by the political polarization emblematic of the international order at the time, which portrayed economic and social rights as the communist agenda,[214] or by the potential issues of justiciability of economic, social and cultural (ESC) rights.[215] Regardless, European Court of Human Rights has managed to interpret the ECHR in such a manner as to include a limited number of ESC rights within the ambit of the Convention.[216]

The ECHR originally only contained a supplementary non-discrimination provision in Article 14, meaning that under the ECHR's core text, member states are obligated to prohibit discrimination only as far as the limited amount of rights under the Convention are concerned. This approach says a lot about the drafters' initial intention towards the scope of the Convention or how much its protective regime could encroach into the territory of states' sovereign decision-making. Rather than constituting a 'universal' equality standard, which would operate as an independent human right and prompt a

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[208] Council of Europe, 'Details of Treaty No.005' (*Treaty Office*) <https://www.coe.int/en/web/conventions/full-list> accessed 6 April 2020.
[209] 'European Convention on Human Rights - How It Works' (*Impact of the European Convention on Human Rights*) <https://www.coe.int/en/web/impact-convention-human-rights/how-it-works> accessed 27 May 2020.
[210] European Convention on Human Rights Preamble.
[211] ibid (emphasis added).
[212] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 1.
[213] European Convention on Human Rights Article 12.
[214] Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press 2017) 329–330
[215] ibid 329.
[216] Schabas (n 212) 63.

subsequent, separate line of applications and litigations, the drafters of the ECHR opted to utilize equality as a supplementary provision, strengthening and affirming the minimalist requirements of the Convention.[217]

8.3.1 The evolution of Non-discrimination Within the ECHR

Article 14 and Article 1 of Protocol No. 12 jointly constitute ECHR's non-discrimination system and it is through the ECtHR's interpretation of these provisions that theoretical principles become operational in practice. The case-law of the ECtHR provides a framework of non-discrimination and dictates the margins of the fine line between permissible differentiation and scorned discrimination.

As the ECtHR has reiterated numerous times, the Convention is a living instrument[218] and it evolves with time. The more formal manner of this evolution is via the Protocols which add new rights to or extend the scope of the existing ones in the core text. The other method is through the Court's case-law and its progressive interpretation of the rights that amends the Convention's substance in the process. In the sections below, the thesis discusses both methods of evolution of the ECHR.

8.3.1.1 Article 14 of the ECHR

The evolution of ECHR's non-discrimination standards has not been limited to adding new rights to the Convention; it also takes place through progressive interpretation of existing provisions. In this regard, Article 14 undeniably plays a central role, regardless of its subsidiary nature. Primarily, it should be emphasized from the beginning that, indeed, there should be other rights or freedoms at stake for Article 14 to be invoked, but beyond that, it can operate independently, meaning that an Article 14 violation can be found even if there is no violation of another right in a specific case.[219] Therefore, in the words of the ECtHR, Article 14 is autonomous to some extent.[220]

Article 14 creates the basis of the analysis for the thesis findings as it is the main source of the ECtHR's case-law and, hence, the operational standards as well. Therefore, the substance and contents of this Article are distributed in the following sections. On the other hand, Article 1 of Protocol No. 12 cannot boast of the same extent of application

[217] ibid 556.
[218] *Tyrer v the United Kingdom* [2014] European Court of Human Rights App no. no 5856/72.
[219] Schabas (n 212) 562.
[220] *Sejdić and Finci v Bosnia and Herzegovina* [2009] European Court of Human Rights App nos. 27996/06 and 34836/06 [39].

and implementation and, hence, will be discussed comparably lengthily in the following section.

8.3.1.2 The Protocol No. 12

Protocol No. 12 of the ECHR[221] was adopted in 2000 and entered into force in 2005, after it was signed and ratified by 10 member states.[222] The Protocol admitted that the equality regime of the ECHR was lagging behind as it took "further steps to promote the equality of all persons" and made a long-missing assertion of the "fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law."[223]

Paragraph 1, Article 1 of Protocol No. 12 establishes that "the enjoyment of any right set forth by law shall be secured without discrimination on any ground …" followed by an open-ended list of grounds, repeating the Article 14 enumeration. Paragraph 2 of the same Article prohibits the discrimination by public authorities on any grounds listed in the previous paragraph.[224]

The significance of Protocol No. 12 lies in its expanding power. It builds on the legacy and wording of Article 14[225] and advances the ECHR's equality regime to a new level by applying the prohibition of discrimination in the domestic legal sphere of the member states, irrespective of whether that law regulates the subject matter of any of the substantive rights in the Convention. By doing so, Protocol No. 12 establishes a substantive fundamental right against non-discrimination, which encompasses every possible direction of domestic regulations, including the traditionally eschewed economic and social rights.

Protocol No. 12 applies to legislative provisions as well as to its implementation by public authorities, even if they act in their discretion or do not act at all (omission). In

[221] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2000.
[222] Council of Europe, 'Details of Treaty No.177' <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177> Accessed 27 March 2020
[223] Protocol No. 12 Preamble.
[224] ibid Article 1.
[225] Council of Europe, 'Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms,' ETS No.177 paras. 18-19 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cce48> Accessed 27 March 2020

this sense, the content of the Protocol is quite extensive and furthers the protection against discrimination to the state action beyond the constraints of the Convention.

However, the Protocol's progressive statements have had limited application in practice for number of reasons. First, it has only been ratified by 20 CoE member states (slightly more than 42%) and there is an evident absence of influential states from the list – Sweden, the UK, Poland, France, Germany, Russia and Italy, to name a few.[226] Second, in a poor display of its prognostic abilities,[227] the ECtHR has adjudicated on an extremely modest number of cases with respect to Protocol No. 12: the Court's online registry of its case-law shows only 7 judgements and 142 decisions delivered by the Court.[228]

As a conclusion for Protocol No. 12 and its role in the Convention, it should be noted that its limitations cannot be ignored and the provision has a long way to go to attain the significance of Article 14. However, the Protocol's more successful predecessor, Article 14, had a slow start too: the Court found violation of Article 14 in only 4 cases from 1959 to 1990.[229] Regardless of its lack of substance or case law to reinforce its standing and role within the ECHR, Protocol No. 12 remains a promising provision.

8.3.2 The Non-discrimination system under the Convention

The sections below elaborate on how the provisions of equality and non-discrimination have been translated into operational standards and what the implications are. First, Section 8.3.2.1 clarifies the definition of discrimination under the ECHR, and Section 8.3.2.2 follows with the elaboration on the operational standards developed by the ECtHR.

8.3.2.1 Defining discrimination

The ECHR protects persons under its jurisdiction from "discrimination on any ground,"[230] and while discrimination is a term widely referred to by the media, politicians, celebrities in our everyday lives, the ECHR has a very particular operational

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[226] Council of Europe, 'Chart of signatures and ratifications of Treaty 177,' ETS No.177 <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=jl4pEFTi> Accessed 27 March 2020
[227] Schabas (n 212) 1180.
[228] (situation by March 28) https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}
[229] Schabas (n 212) 1178.
[230] European Convention on Human Rights Article 14 and Article 1 of Protocol No. 12.

concept in mind. Before delving into more operational standards, it is necessary to explore the ECHR's understanding of discrimination and determine its constitutive elements.

The ECHR does not explicitly define discrimination, but its scope and meaning can be inferred from the case-law of the ECtHR. The concept of discrimination under the Convention is not narrowly understood and encompasses different categories of discriminatory treatment, such as direct and indirect discrimination, intersectional discrimination or discrimination by association.[231]

Direct discrimination implies that there is "a difference in the treatment of persons in analogous, or relevantly similar, situations."[232] Through prohibiting direct discrimination, the ECHR states that individuals in similar situations must be treated similarly[233] and cases of direct discrimination generally involve evident distinction between comparator groups in the form of explicit exclusion of a particular group, or by providing advantage to the other group. In any form, direct discrimination imposes clearly discernible "less favourable treatment" on a disadvantaged group.[234]

The indirect discrimination framework goes further and includes "disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group"[235] into the ECHR's equality regime. The result of such seemingly neutral rules or practices are that they put a vulnerable group in a disadvantaged situation, which cannot be addressed by a traditional, formal equality framework.[236]

The case study findings from the Georgian legislation impose the former type of differentiation: they directly distinguish between citizens and non-citizens, excluding

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[231] European Union Agency for Fundamental Rights, Council of Europe and European Court of Human Rights (eds), *Handbook on European Non-Discrimination Law* (2018 edition, Publications Office of the European Union 2018) 39–42; 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (European Court of Human Rights 2020) 11–15 <https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf>.
[232] *Guberina v Croatia* [2016] European Court of Human Rights App no. 23682/13 [69].
[233] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 231) 11.
[234] *Guberina v. Croatia* (n 232) para 77.
[235] *Biao v Denmark [GC]* [2016] European Court of Human Rights App no. 38590/10 103.
[236] One of the examples of such rules was addressed in the famous *SAS v France [GC]* [2014] European Court of Human Rights App no. 43835/11, which concerned a rule banning the concealment of one's face in public places. The rule did not distinguish between groups and imposed a general prohibition on every individual. However, the Court recognized that the rule's primary victims were Muslim women for whom concealing one's face might have been religious and cultural necessity

permanent residents from healthcare, social welfare, labour market or economic activities. However, indirect discrimination and the respective case-law have relevance for permanent residents in Georgia as these cases are the primary indication that the ECHR's approach has gone beyond the formal understanding of equality and tends to contextualize cases and focus on the vulnerable.

However, not every type of differential treatment can constitute discrimination. The ECHR recognizes that states are not prohibited from "treating groups differently in order to correct "factual inequalities" between them."[237] Moreover, according to the Court's case-law, under the prohibition of discrimination, states are also required to "treat differently persons whose situations are significantly different."[238] This standard calls forth the positive implementation of special measures in the cases where they are necessary to correct factual inequalities regardless of whether these inequalities are legally constructed (as in the case of the case of *Thlimmenos v. Greece*, where the applicant was barred from the particular profession due to his criminal conviction)[239] or they result from disabilities (as in the case of *Çam v. Turkey*, where the applicant was refused to be admitted to a music school due to her disability).[240]

8.3.2.2 Discrimination Assessment

Through interpreting the above-elaborated non-discrimination provisions, the European Court of Human Rights has developed a procedure to determine whether, first of all, there is a differentiation between two comparable groups and, then, whether this differentiation (if it is found) constitutes discrimination (the discrimination test). This process adopts the balancing exercise first introduced by the UDHR, and, in the case of differentiation of permanent residents, determines the outcome of the clash between the principle of equality and restrictive state policies.

As an initial step of the discrimination test, the ECtHR has to first assess whether there exists a comparator in the case. The comparator is a person or a group "in analogous, or relevantly similar, situations"[241] compared to which the applicant is treated less

[237] *Stec and Others v the United Kingdom* [2006] European Court of Human Rights App no. 65731/01 and 65900/01 [51].
[238] *Thlimmenos v Greece* [2000] European Court of Human Rights App no. 34369/97 [44].
[239] *Thlimmenos v. Greece* (n 238).
[240] *Çam v Turkey* [2016] European Court of Human Rights App no. 51500/08; 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 231) 14.
[241] *Guberina v. Croatia* (n 232) para 69.

favourably. This wording implies that there is no requirement for formally identical characteristics of comparators but rather "an applicant must demonstrate that, having regard to the particular nature of his or her complaint, he or she was in a relevantly similar situation to others treated differently."[242] The comparability criterion is highly dependent on the context of the case at hand and a measure employed therein, therefore it "must be assessed in the light of the subject-matter and purpose of the measure which makes the distinction in question."[243] For example, in the case concerning differential treatment of Gurkha soldiers[244] as compared to the British ones, the Court discussed the historical situation of Gurkha soldiers i.e. where they were based, their ties to the UK, their expectations settling there after their discharge and whether they had family reunion rights in the UK.[245]

The comparability of two groups in the case does not only have formal implications, but also determine the intensity of the differentiation at hand. As discussed in Chapter 6 and 7, the case of Georgia revealed that permanent residents have the same needs and necessities in terms of healthcare, social security, employment, economic and social participation as citizens as they have close connections with the state and society, contribute financially and socially, depend heavily on the state, etc. Their close comparability meets the formal criteria of differentiation within the areas discussed in the case study, but also demonstrates the intensity and severity of the effects this differentiation has on the group of permanent residents.

Differential treatment does not necessarily constitute discrimination. The ECtHR has stated that if the state provides "an objective and reasonable justification" for such practices, differential treatment will be held to be justified and will not constitute discrimination.[246] The Court has further explained that a justification is objective and reasonable only if the distinction in the particular case serves a legitimate aim and there is a "reasonable relationship of proportionality between the means employed and the

[242] *Fábián v Hungary* [2017] European Court of Human Rights App no. 78117/13 [113].
[243] ibid 121.
[244] Gurkhas are soldiers of Nepalese nationality serving as soldiers for the United Kingdom. 'Who Are the Gurkhas?' *BBC News* (27 July 2010) <https://www.bbc.com/news/uk-10782099> accessed 2 April 2020.
[245] *British Gurkha Welfare Society and Others v the United Kingdom* [2016] European Court of Human Rights App no. 44818/11 [79].
[246] *Çam v. Turkey* (n 240) para 54.

aim sought to be realised."[247] These two components constitute the so-called proportionality test.[248]

Accordingly, to justify differential treatment state has to bring forth a legitimate aim.[249] The Court has accepted restoration of peace,[250] immigration control,[251] national security[252] as legitimate aims, to name a few. However, vague and broad legitimate aims that states generally pursue are not enough alone, there should also be a link between the legitimate aim and the concrete measure employed i.e. the distinction in the case at hand.[253] For instance, in the case of *Abdulaziz and others v. UK*[254] the applicants disputed the rules under which UK residents were differentiated on the ground of sex in the process of obtaining permission for their non-national spouses to enter/remain in the country for settlement. The legitimate aim indicated by the Government according to which the differentiation at hand served the aim of "limiting "primary immigration" … and was justified by the need to protect the domestic labour market at a time of high unemployment."[255] The Court noted that it was "… not convinced that the difference that may nevertheless exist between the respective impact of men and of women on the domestic labour market is sufficiently important to justify the difference of treatment."[256]

After the identification of the legitimate aim and determining its validity vis-à-vis the circumstances of the case, the ECtHR assesses whether the measure (distinction) employed is proportionate with respect to the aim to be achieved.[257] In other words, the Court considers whether the authorities maintained a fair balance between the rights of the individual and the interests of the community.[258] The assessment of proportionality is highly contextual and depends on the factual circumstances of the case, as well as the

[247] *Sejdić and Finci v. Bosnia and Herzegovina* (n 220) para 42.
[248] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 231) 17.
[249] ibid.
[250] *Sejdić and Finci v. Bosnia and Herzegovina* (n 220).
[251] *Osman v Denmark* [2011] European Court of Human Rights App no. 38058/09.
[252] *Konstantin Markin v. Russia* (n 22).
[253] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 231) 17.
[254] *Abdulaziz, Cabales and Balkandali v the United Kingdom* [1985] European Court of Human Rights App no. 9214/80; 9473/81; 9474/81.
[255] ibid 75.
[256] ibid 79.
[257] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 231) 18.
[258] *Zarb Adami v Malta* [2006] European Court of Human Rights App no. 17209/02 [73].

other substantive right Article 14 has been invoked in conjunction with.[259] One of the factors named to sway the Court in the assessment of proportionality is whether the differentiation conforms with the common standard of other Contracting States.[260] Another notable aspect that can be considered on this stage of adjudication is whether there were feasible and possible alternatives to the distinction in the case, but this as well depends on the context and the Court will rarely step into the sphere of domestic decision-making.[261]

The doctrine of margin of appreciation is yet another crucial aspect of assessing discrimination under the ECHR. The ECtHR never discusses the general aspects of non-discrimination provisions without mentioning that "the Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment."[262] The scope of the margin accorded to the state in a particular case is also highly contextual, depending on "the circumstances, the subject matter and the background."[263] Through the doctrine, the Court pays homage to the sovereignty of the contracting states and declares that in certain cases 'states know better.' The Court assesses the scope of the margin on a case-by-case basis, but it also has predetermined standards in relation with certain protected grounds or the subject-matter of distinction. For example, when the treatment differentiates on the basis of gender, "very weighty reasons" are required to justify it.[264]

This brief overview of the conceptual and operational non-discrimination standards sets out the core aspects of the process and, this way, outlines the following chapter. Chapter 9 applies the ECHR standards to the case study findings and naturally it discusses the above and other relevant standards in detail.

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[259] To assess the proportionality of the restriction on to social (housing) benefits, the Court considered applicant's housing situation after the measure, namely, that she was never left without housing, there were other legal obligations on the state to assist her, she was able to find housing in the private sector and, after some time, she was provided with social housing, in *Bah v the United Kingdom* [2011] European Court of Human Rights App no. 56328/07

[260] DJ Harris and others, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Third edition, Oxford University Press 2014) 795; while reviewing the compliance of the tax that imposed on men unfit for military service because of a physical disability with Article 14, the Court, among other factors, also considered that this type of tax was uncommon in other countries "at least in Europe" in *Glor v Switzerland* [2009] European Court of Human Rights App no. 13444/04 [83]

[261] Harris and others (n 260) 795.

[262] *Bah v. the United Kingdom* (n 259) para 36; *Zarb Adami v. Malta* (n 258) para 74.

[263] *Biao v. Denmark [GC]* (n 235) para 93.

[264] *Konstantin Markin v. Russia* (n 22) para 127.

9 European Court of Human Rights to the Rescue?

This Chapter applies the European Convention on Human Rights (ECHR) standards to the exclusionary areas identified in the case study and respective regulations. The ECHR standards are naturally extrapolated from the case-law of the European Court of Human Rights (ECtHR), but this application does not imply step-by-step application of the discrimination test, results of which would be highly speculative. Rather, Chapter 9 identifies the general approach of the ECtHR through analysing the case-law tendencies and places it within the context of the case study findings. Accordingly, the core text is divided into two, passive and active exclusion areas.

9.1 Georgia and the European Convention

The ECHR and the ECtHR have been playing a crucial role in shaping the legal system of Georgia both by direct application to the cases against Georgia and by indirectly providing guidelines through the case-law against other states. Georgia ratified the ECHR more than 20 years ago. During this time, the ECtHR has received more than 6 000 applications from Georgia and has issued 104 judgements in total (finding violation in 83 of them).[265] Beyond these numbers, the ECtHR, which usually represents the last resort to protect human rights and freedoms, has adjudged on many landmark and politically controversial cases in Georgia.[266] Additionally, the ECtHR's case-law has been increasingly applied and cited by Georgian courts, especially, the Supreme Court of Georgia.[267]

Due to the special interrelation between Georgia and the ECHR, this thesis selects the ECtHR and its case-law as the concrete manifestation of the IHRL to apply to the findings from the case study of Georgia. The thesis delves into the case-law to explore the standards for the sphere-specific exclusions discussed in the case study. The chapters that follow first consider the case-law on social welfare (passive exclusion) and then moves to restrictions on specific professions or other rights (active exclusion).

[265] Public Relations Unit, 'The ECHR and Georgia: Facts and Numbers' (European Court of Human Rights 2020) <https://www.echr.coe.int/Documents/Facts_Figures_Georgia_ENG.pdf>.
[266] Few examples include*Merabishvili v Georgia* [2017] European Court of Human Rights App no. 72508/13; *Rustavi 2 Broadcasting Company Ltd and Others v Georgia* [2019] European Court of Human Rights App no. 16812/17.
[267] Konstantine Korkelia, 'Judicial Activism and the Influence of the EUuopean Convention on Human Rights on Judicial Practice in Georgia' (nd) IV Constitutional Law Review 42.

9.2 The ECHR and Passive Exclusion

The category of passive exclusion, as employed in this thesis, includes the areas of healthcare, social security and regulations aimed at demographic development. The analysis of the case study revealed that permanent residents are severely differentiated in these areas, and these disparities are sometimes affirmed judicially as well.[268] This section reviews the ECtHR standards established in the field of social security and then discusses the case study findings against these standards.

9.2.1 Social Welfare in the ECHR

9.2.1.1 How Social Rights Are Included in the Convention

As the ECtHR has reiterated numerous times, the Convention is a living instrument[269] and it evolves with time. Through this evolution, deliberately[270] eschewed social rights have also been brought into the scope of the ECHR by means of interpreting Article 14. According to the ECtHR, Article 14 "applies also to those additional rights, falling within the general scope of any Article of the Convention, for which the State has voluntarily decided to provide."[271] Through this principle, partnered up with Article 1 of the Protocol No. 1 which establishes the right to property,[272] Article 14 extends the protection from discrimination to the field of social welfare and benefits.

To determine the applicability of the right to property, it is essential to establish what types of benefits are considered to fall within the scope of the right to property. In terms of funding sources, the Court does not require the existence of a link between a benefit and contributions as it considers both contributory and non-contributory benefits as "possessions" under the scope of the Convention.[273] According to the Grand Chamber, this decision aimed to "reflect the reality" that welfare benefits are organized in diverse ways,[274] whereas "many individuals are, for all or part of their lives, completely

[268] For example, the case of *Citizens of the Republic of Armenia - Garnik Varderesian, Artavazd Khachatrian and Ani Minasian v. the Parliament of Georgia* (n 99).
[269] *Tyrer v. the United Kingdom* (n 218).
[270] Schabas (n 212) 1.
[271] *Carson and Others v the United Kingdom* [2010] European Court of Human Rights App no. 42184/05 36.
[272] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms 1952 Article 1.
[273] *Decision As To The Admissibility of Stec and Others v the United Kingdom* [2005] European Court of Human Rights App no. 65731/01 and 65900/01.
[274] ibid 50.

dependent for survival on social security and welfare benefits."[275] Therefore, adapted to the reality, this approach of the Court applies Article 1 of the Protocol No. 1 to benefits as long as there is an "assertible right" to benefits i.e. fulfils other conditions of eligibility.[276]

Furthermore, the Court has also reviewed issues related to social welfare benefits under Article 14 in conjunction with Article 8 (right to private and family life) when the benefits involved were connected with family life. Especially relevant for the topic of this thesis are the cases of differentiation on the ground of nationality. In this regard, leading cases include *Dhahbi*,[277] *Weller*[278] and *Okpisz*[279] among others. Moreover, the non-discrimination regime of Article 1 of Protocol No. 12 applies to any type of regulation regardless of whether its content falls within the scope of substantive rights of the Convention. However, due to limited case-law one can only discuss its potential effect.

9.2.1.2 The ECtHR Approach in Social Welfare Cases

The general approach of the ECtHR to matters of social security or "measures of economic or social strategy,"[280] is in favour of the state. The Court accords wide margin of appreciation to states to decide on matters in the field of social welfare because "… national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds."[281] Therefore, the ECtHR will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation."[282] The Court has, for example in *Stummer* case,[283] considered that Austria's decision not to include certain prisoners in the old-age pension scheme did not exceed the margin of appreciation accorded to it.[284]

The application of margin of appreciation doctrine, although the predetermined standards that might exist in certain cases (for instance, social rights), is highly contextual in general and, rather than dictating the outcome of the case, it gives an upper

[275] ibid 51.
[276] ibid.
[277] *Dhahbi v Italy* [2014] European Court of Human Rights App no. 17120/09.
[278] *Weller v Hungary* [2009] European Court of Human Rights App no. 44399/05.
[279] *Okpisz v Germany* [2005] European Court of Human Rights App no. 59140/00.
[280] *Stec and Others v. the United Kingdom* (n 237) para 52.
[281] *Fábián v. Hungary* (n 242) para 115.
[282] *Ruszkowska v Poland* [2014] European Court of Human Rights App no. 6717/08 [53].
[283] *Stummer v Austria* [2011] European Court of Human Rights App no. 37452/02.
[284] ibid 99–111.

hand to a party (depending on whether it is wide or narrow). Moreover, often, there are cases where the two generally applicable standards clash. In this regard, the case of *Guberina*[285] is a perfect example. The case involved a tax exemption application for purchasing a real property to find a more adapted place for a disabled child that was rejected by authorities, as this reason did not fall within their interpretation of "housing needs."[286] The Court, argued that the exemption at hand was in the field of economic or social strategy, hence, wide margin of appreciation, but, also noted that

> [on] the other hand, if a restriction on fundamental rights applies to a particularly vulnerable group in society … then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question. The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs.[287]

In this case, the Court declared the treatment discriminatory on the ground of disability. But, as it is evident from the case study of Georgia (among other sources), the cited quote perfectly fits the treatment of non-citizens too. Moreover, without as thorough an explanation as the one provided above, the ECtHR has stated that "very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention."[288] This line from the *Gaygusuz* case repeats itself throughout the case-law and can be seen in the recent case-law such as *the British Gurkha Welfare Society*[289] and *Dhahbi*[290] cases.

In some cases, the Court has phrased its argumentation in such a way that it implies that the strict standard for the ground of nationality is counterbalanced by a wide margin of appreciation. For example, in *the British Gurkha Welfare Society* it noted that "in considering whether such "very weighty reasons" exist, the Court must be mindful of

[285] *Guberina v. Croatia* (n 232).
[286] ibid 12.
[287] ibid 73.
[288] *Gaygusuz v Austria* [1996] European Court of Human Rights App no. 17371/90 42.
[289] *British Gurkha Welfare Society and Others v. the United Kingdom* (n 245).
[290] *Dhahbi v. Italy* (n 277).

the wide margin usually allowed to the State under the Convention when it comes to general measures of economic or social strategy."[291] In other cases, the loose standard for economic and social sphere gets adjusted with "weighty reasons," as was the case in the above cited *Guberina* case. This struggle between "weighty reasons" and "wide margin" is not easily predictable; sometimes it ends in favour of the applicant,[292] on other occasions, the applicant is not as lucky.[293] However, at the end, it all comes down to the context of the differentiation in a case and, as noted in the case-law, "the final decision as to the observance of the Convention's requirements rests with the Court."[294]

9.2.1.3 Application of the ECHR Standards to the Case Study Findings

This section considers the ECtHR's selected case-law against the findings in the passive exclusion part of the case study (section 7.1). The objective here is not to conduct a detailed (predictive) analysis of what the ECtHR would hypothetically determine if the discussed Georgian law was brought before it, but, rather, to align these findings with the cases involving similar issues and establish a general overview of where, if anywhere, they fit in the interpretation of the ECHR.

The case study analysis revealed existing disparities between permanent residents and citizens in various areas of social security. Firstly, permanent residents get limited funding for healthcare through the state healthcare programmes of Georgia. Permanent residents are not covered by the core part of the Universal Healthcare regulation, State Healthcare programmes and Hepatitis C Elimination Programme. The general aim of these regulations is to ensure that persons covered have access to the necessary healthcare and are not excluded from the required medical treatment due to financial reasons. Further, permanent residents are also excluded from other types of social aid, financial or non-financial, that are aimed to (fractionally) compensate for different types of disadvantage, may it be economic, social, caused by disability, or intersectional.

All of the above-listed exclusionary regulations provide support on the basis of the actual necessity, which is induced by different sets of circumstances, and, as a rule, include this necessity as a required eligibility criterion for qualifying for a particular

[291] *British Gurkha Welfare Society and Others v. the United Kingdom* (n 245) para 81.
[292] *Koua Poirrez v. France* (n 2); *Gaygusuz v. Austria* (n 288).
[293] *Bah v. the United Kingdom* (n 259).
[294] *Dhahbi v. Italy* (n 277) para 46.

benefit. For example, the Hepatitis C Elimination Programme sets a prerequisite of a diagnosis of the disease to include a person in the programme and fund the respective treatment. The same goes for the eligibility for the Programme of Supportive Device Provision: one naturally needs to have a need of such a device, confirmed by respective socio-medical documentation. The status of citizenship has no link with the substantive eligibility criteria as non-citizens and citizens alike are susceptible to health, social, economic and other risks for safeguarding against which these programmes create a safety net. Henceforth, claims of discrimination that individual permanent residents might have to these programmes would meet the "assertable right" threshold and fall within the meaning of possessions for the aims of the ECHR.

The ECtHR has adjudged on the matters related to the differentiation on the ground of nationality (citizenship) in the field of social welfare number of times. As the general principles of this specific issue is discussed above, this section considers specific case-law of the ECtHR.

The facts in the *Koua Poirrez v. France*[295] case involved a national of Ivory Coast, who was refused a non-contributory handicapped adult allowance on the sole ground that he was not a national of France. The Government contended that as the state had to balance between welfare income and expenditure, and the applicant could receive other benefits, the regulation served a legitimate aim and met the requirements of proportionality. The Court in the case considered, among other factors, that the applicant was a legal resident and there were no other issues with his eligibility for the social benefits than his nationality. Therefore, the ECtHR ruled that there was no objective and reasonable justification for the distinction and, thus, it violated Article 14 in conjunction with Article 1 of the Protocol No. 1.[296]

The Court reached a similar outcome in the foundational case of *Gaygusuz v. Austria*,[297] which involved a refusal to grant unemployment benefits to the applicant on the ground that he was not a citizen of Austria. The Government of Austria advanced the argument that "the difference in treatment was based on the idea that the State has special responsibility for its own nationals and must take care of them and provide for their

[295] *Koua Poirrez v. France* (n 2).
[296] ibid 49.
[297] *Gaygusuz v. Austria* (n 288).

essential needs."[298] The Court, among other factors, considered that the applicant was legally residing in Austria and had paid contributions to the Fund concerned on the same basis as other Austrian nationals. In light of these facts, the ECtHR regarded the Government arguments as unpersuasive and ruled in favour of the applicant, acknowledging the discriminatory nature of the exclusion.

The Court has similarly found a violation of Article 14 with respect to pension benefits in the case of *Andrejeva v. Latvia*,[299] where the Government argued, *inter alia*, that the state enjoyed wide margin of appreciation in the social welfare sphere, and the applicant could become naturalised and correct the situation this way. The Court did not deem these arguments to be persuasive enough and ruled that the treatment in the case did not meet the requirements of proportionality, hence finding the treatment discriminatory.

Another significant area of distinction identified through the case study analysis is the line of regulations aimed to support demographic improvement. Here, the objective is different than in the healthcare and social support benefits: they aim to improve demographic situation in certain areas of Georgia, emphasizing, among others, high mountainous regions. These regulations acknowledge that some parts of the country are more vulnerable to economic and social disadvantages and provides assistance for the population residing in these parts. The assistance through these regulations can involve monetary or non-monetary benefits and can be tied to individuals, their children or families.

In this respect (as well as for other regulations discussed above), it is relevant to discuss the line of cases involving social welfare benefits that fall within the scope of Article 8 of the Convention and trigger Article 14 protection in this manner. This case-law can be exemplified by *Dhahbi v. Italy*,[300] which involved the refusal to grant a family allowance on the ground of nationality. Ruling once again in favour of the applicant, the Court, among other considerations, underlined the applicant's lawful, long-term residence in the country and noted that, therefore, "he did not belong to the category of persons who, as a rule, do not contribute to the funding of public services and in relation to whom a State may have legitimate reasons for curtailing the use of resource-hungry

[298] ibid 45.
[299] *Andrejeva v. Latvia* (n 4).
[300] *Dhahbi v. Italy* (n 277).

public services such as social insurance schemes, public benefits and health care."[301] Another crucial point the ECtHR made in this judgement relates to the legitimate aim of "budgetary reasons" advanced by the Government. The Court recognized that budgetary reasons could be a legitimate aim for distinctions in the sphere of social and economic policy, but "that aim cannot by itself justify the difference in treatment complained of."[302] Furthermore, the ECtHR has also directly considered the legislation aimed to improve demographic situation in the case *Saidoun and Fawsie v. Greece.*[303] The Court accepted the legitimate aim of addressing the demographic problem of the country, but could not find any justification in the case for imposing requirements of Greek nationality or origin as a necessary criteria for qualifying for the allowance for large families.[304]

The analysis of the ECtHR case-law shows that the Court recognizes that discrimination on the ground of nationality has roots in the historic prejudice and can often be utilized to subject the vulnerable groups of non-citizens to social exclusion. Therefore, it requires "very weighty reasons" to justify such differentiation and this threshold is extremely difficult to overcome even in the sphere of social and economic policy, despite the broad margin of appreciation accorded to states within. Extremely susceptible before the Court appear to be broad state arguments such as, for instance, budgetary reasons, demographic improvement or the reference to the margin of appreciation. Georgian legislation that establishes exclusionary regulations for non-citizens and, especially, permanent residents in the field of social security and welfare has exactly such broad and superficial nature. Citizens and non-citizens face equal risks of being susceptible to the risks that these regulations address and drawing differentiating line between them seems arbitrary and unsupported. This is reinforced especially in light of the constitutional proceedings and feeble legitimate aims advanced by the Government in the Georgian case on the differentiation established by the Law on High Mountainous Regions.[305]

[301] ibid 42.
[302] ibid 53.
[303] *Saidoun and Fawsie v Greece* [2011] European Court of Human Rights App no. 40083/07 and 40080/07.
[304] ibid.
[305] *Citizens of the Republic of Armenia - Garnik Varderesian, Artavazd Khachatrian and Ani Minasian v. the Parliament of Georgia* (n 99).

Additionally, as noted above, the ECtHR takes into consideration the residence status of the individual subjected to differentiation. While the Court accepts that "a State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding,"[306] it does not condone such limitations on persons whose status and participation in the society (including contributing directly or indirectly to the social welfare system) is the opposite of "short-term and illegal." Permanent residents in Georgia represent the group that generally pay their dues, have close ties with the society and participate in its social or economic life in the same way as citizens.

To conclude, the case-law of the ECtHR and, hence, the standards stemming from the ECHR seem to be speaking against the exclusionary regime employed in Georgia's social security policy. This policy, translated into the regulations dissected in the case study section, does not take into consideration special vulnerability that non-citizens, including permanent residents, are subjected to as outsiders. Accordingly, it neither puts forward "weighty reasons" for these distinctions, nor distinguishes between drastically distinct standings of different groups of non-citizens, hence, often equating permanent residents to short-term visitors.

9.3 The ECHR and Active Exclusion

In the active exclusion section (7.2.), the case study analysis discussed three main issues: employment in public sector, the profession of a lawyer and ownership of agricultural land. All of these three areas exclude permanent residents. The analysis in this section also follows the same structure, identifying the ECtHR case-law that bears direct implications for the above-mentioned areas of exclusion.

The ECtHR has not yet considered the issue of prohibition of ownership of agricultural land on the ground of nationality. However, the scope of Article 1 of Protocol No. 1, which protects the right to property, naturally includes physical property under the autonomous concept of "possessions."[307] In conjunction with Article 14, as already discussed above, this provision creates protection for possessions that are placed out of

[306] *Ponomaryovi v Bulgaria* [2011] European Court of Human Rights App no. 5335/05 [54].
[307] 'Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights - Protection of Property' (European Court of Human Rights 2020) 7 <https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf>.

the reach of a person differentiated against. The test, referred as an "assertible right" in the above section, is whether the applicant would have a right enforceable under national law if the restriction did not exist.[308] To apply this to the case study, it is indisputable that permanent residents would have an enforceable right to own agricultural land if they were not prohibited to do so in Georgia.

The ECtHR has recently considered the matter related to alienation of agricultural land under the right to property, without involving Article 14 of the Convention. The case *Zelenchuk and Tsytsyura v. Ukraine*[309] concerned the total ban that was placed on the sale of agricultural land to Ukrainian or foreign nationals alike. As a result, the applicants could not sell agricultural land under their ownership. The Court ruled in favour of the applicants in the case and indicated that the restriction placed excessive burden on the applicants and failed to strike a fair balance between the general interest of the community and the property rights of individuals.

However, this conclusion was not made lightly, and the Court considered various factors relevant to the case. First of all, the Court accepted that the objectives of the restrictive legislation of "the avoidance of excessive concentration of land in the hands of wealthy individuals or hostile powers, its withdrawal from cultivation, the desire to avoid landlessness and impoverishment of the rural population" served "the needs of national and food security."[310] The Court also noted its subsidiary role and attempted to distance itself from the "matters of general policy" where national policy-maker should have a wide margin of appreciation.[311] Interestingly, the Court also conducted a comparative law research, which revealed that among a wide array of restrictions on the right to property on agricultural land, nine CoE member states have a general ban on sale of agricultural land to foreign nationals. Furthermore, the ECtHR referred to this research to assert that a total ban was an uncommon practice.[312]

One can only speculate how these, cautious and reserved standards would apply, first of all, in conjunction with Article 14 and the case of differentiation on the ground of nationality, which, traditionally, calls for very weighty reasons. Additionally, the

[308] ibid 45.
[309] *Zelenchuk and Tsytsyura v Ukraine* [2018] European Court of Human Rights App no. 846/16 and 1075/16.
[310] ibid 108.
[311] ibid 111.
[312] ibid 127.

ECtHR would have to consider an extremely peculiar and multi-layered context of Georgia, with its constitutional battles and political interests on the table. Last, but not least, it is curious how much weight would be given to a comparative aspect and the fact that it is a fairly common practice among CoE states to employ this restriction. However, this tale of human rights clashing with this manifestation of popular politics is yet to unfold and, if it ever does, it will highlight many aspects of universality v. particularistic approach paradigm.

The case study analysis also revealed that permanent residents cannot be employed in significant parts of the public sector, which require citizenship as an eligibility criterion. However, there is no substantive provision in the European Convention that protects employment rights, hence, Article 14 cannot be engaged to protect persons against discrimination in the area of employment *per se*. Certainly, the ECtHR has adjudged on various issues that to some extent involved discrimination in the employment under Article 8 (right to private life),[313] it has repeatedly emphasized that the access to civil service was deliberately omitted from the ECHR,[314] and as the ECtHR reviews the interferences that public servants face in relation to their substantive rights under the Convention, Article 14 cannot be engaged to protect permanent residents in Georgia against the exclusive regime that they are subjected to with regards to the employment in the public service. Therefore, the ECHR does not encompass the protection of human rights in this particular area of active exclusion and, subsequently, cannot help advancing the equal employment of permanent residents in the public sector.

Another profession that is off-limits for permanent residents in Georgia is the profession of a lawyer. The ECtHR considered a similar restriction in the case of *Bigaeva v. Greece*,[315] which concerned a foreign national who was restricted from becoming a member of the bar association in Greece and, hence, could not practice the lawyer profession. The Court found a violation of Article 8 and briefly considered the aspect of differentiation on the ground of nationality. The ECtHR noted that the profession of a lawyer was a peculiar one: representing an independent profession on

[313] For example, *Sidabras and Džiautas v Lithuania* [2004] European Court of Human Rights App no. 55480/00 and 59330/00.
[314] *Vogt v Germany* [1995] European Court of Human Rights App no. 17851/91 [43]; *Sidabras and Džiautas v. Lithuania* (n 313) para 46.
[315] *Bigaeva v Greece* [2009] European Court of Human Rights App no. 26713/05.

the one hand, and, performing public functions on the other.[316] The Court did not find the violation of Article 14 in the case and deferred strongly to the state's margin of appreciation to determine who could acquire the profession of a lawyer.[317] This case undoubtedly bears negative and discouraging implications for similar claims, but it still ended positively for applicant and involves only a brief and superficial consideration of the non-discrimination claim, leaving a glimmer of hope for future prospects for the equality of non-citizens.

In summary, the case-law of the ECtHR does not look promising for the protection of equality with respect to the issues discussed under the category of active exclusion. The Court has not explored the prohibition of agricultural land ownership for non-citizens, but the considerations in its case-law give the impression that overcoming the doctrine of margin of appreciation in this issue will be extremely challenging for potential applicants. The ECtHR's protection is completely missing with respect to restrictions on acquiring civil service, and it defers to the state's margin of appreciation in the differentiation of non-nationals in the lawyer's profession. Therefore, the ECHR's protective regime is insufficient for the protection of permanent residents in the areas encompassed by the active exclusion in this thesis.

[316] ibid 39.
[317] ibid 40.

10 Discussing the Findings

With the specific focus on the position of permanent residents in the legal system of Georgia, this thesis draws attention to the general tendency of excluding non-citizens as outsiders and explores how this tendency is translated into legal norms on the international and domestic levels. Through the application of human rights analysis and, in particular, the substantive equality approach, to the concrete manifestations of this practice in the case study, as well to the broad implications of the IHRL discussed within, the thesis exposes the reasons and the effects of the less favourable treatment.

This sections below aim to discuss the findings of the thesis and set them into the broader context of state sovereignty, human rights and their interrelation. Section 10.1 aligns the findings with the theoretical considerations briefly reviewed under Section 3.2. Section 10.2 briefly analyses actual and potential argumentation supporting the differentiation between citizens and permanent residents. Section 10.3 concludes this chapter with the concrete standards of equality and non-discrimination extrapolated from Georgia's legal system and the analysis of the IHRL in light of substantive equality considerations.

10.1 "We, the Citizens"

'Sovereign is he who decides on the exception.'[318]

In Section 3.2 the thesis investigates the roots of the exclusionary regimes against non-citizens and, among other possible reasons, suggests that a state as a "collectivity of citizens"[319] privileges the insider group of citizens over the outsider group of non-citizens by default, as equalizing these two would devalue citizenship[320] and, hence, the identity of the state. The thesis considers several concrete manifestations of this tendency in the areas of healthcare, social welfare, access to labour market, etc. This theory implies that states often differentiate on the ground of nationality arbitrarily, without having objective and reasonable justifications that human rights require.

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[318] Carl Schmitt, 'Political Theology: Four Chapters on the Concept of Sovereignty. 1922' [1985] Trans. George Schwab. Chicago: U of Chicago P cited in Andreas Follesdal, 'Appreciating the Margin of Appreciation' in Adam Etinson, *Human Rights: Moral or Political?*, vol 1 (Oxford University Press 2018)

[319] Tharrileth K Oommen, *Citizenship, Nationality and Ethnicity: Reconciling Competing Identities* (Polity Press Cambridge 1997) 8.

[320] Phillip Cole, 'Introduction: "Border Crossings" — The Dimensions of Membership' 1 4 <https://doi.org/10.1057/9780230246775_1>.

This, on its part, means an inevitable conflict between state actions and policies, and international or domestic human rights systems. The thesis has identified various areas where these clashes happen, but two examples warrant special emphasis: the dichotomy between wide margin of appreciation versus very weighty reasons in the ECtHR case-law (Chapter 9), and the circumstances surrounding the constitutional proceedings of agricultural land restrictions in Georgia (Section 7.2).

This conflict implies that both sides have to make concessions: states have accepted and, to some (individual) extent, implement the rules and principles of the IHRL, including non-discrimination and equality clauses, and the IHRL cedes some areas of life, completely or partially, to state discretion. Relevant to this thesis, the example of the latter is the ICESCR's rule that accords developing states complete discretion to decide on the extent of economic rights provided to non-citizens, which asserts the existence of prioritization of citizens in the area of economic rights while disadvantaging non-citizens, regardless of individual circumstances.

In summary, the search for the equality for non-nationals ultimately aims to reach the truce in the conflict between state sovereignty and the IHRL. Finding perfect balance here is difficult, especially considering the defining role of citizenship for the identity of modern sovereign states. Accordingly, states have fought hard (within the framework of human rights) to successfully justify the disparities of non-citizens in international and domestic courts alike. Section 10.2 below briefly discusses the argumentation states refer to support these restrictions.

10.2 For Reasons Too Broad

As discussed in Chapters 8 and 9, in the human rights framework, the restrictions on human rights and freedoms have to be justified or they constitute a violation of respective state obligation. Whether a restriction will be justified or not depends on the arguments brought forth by the state in the proceedings or identified by the Court through the analysis of the context or the normative content surrounding the restriction. Therefore, there are several sources where the arguments supporting a concrete restriction can be extracted from. However, this Section only reviews the arguments often employed by states in human rights proceedings, as they are explicit and do not require a certain extent of speculation as is implied in contextual/normative analysis.

State arguments supporting differentiation (or discrimination) of non-nationals have been evolving along with the international human rights law. In the landmark case of *Gaygusuz,*[321] the state argument was basically the substance of discrimination – that it owed special responsibilities to its citizens, which warranted distinctions made to the detriment of non-citizens. Following this judgement, state argumentation has evolved to call for, for instance, balancing between welfare income and expenditure,[322] or regulation of a profession with public responsibility implications,[323] which have been accepted as legitimate aims. However, this section focuses two main arguments that are of special relevance for the case of Georgia: budgetary reasons and acquiring of citizenship.

Budgetary reasons, an umbrella term that denotes various economic arguments, have been invoked by Georgian authorities too in domestic proceedings to justify excluding permanent residents from the benefits of the Law on High Mountainous Regions. However, dismissing the initial form of this argument, economic security, the Court still based its judgement on the consideration that providing benefits to Georgian citizens represented a more stable investment for the objective of the Law (i.e. improvement of the demographic situation).[324] The argument of budgetary considerations has also been accepted as a legitimate aim by the ECtHR, which, nonetheless noted that budgetary considerations "cannot by itself justify the difference in treatment complained of."[325] Therefore, budgetary reasons require additional reasoning, such as the argumentation in the Georgian case above, to justify differentiation in the case.

However, basing differentiation on economic grounds is a slippery decision, whether supplemented by an additional argument or not. This might result in subjecting the matters of equality to a cost-benefit analysis, which would absolutely contradict the foundational principles of human dignity and equality. The flaws of the above-mentioned judgement, discussed in detail in Section 7.1.2.3, attest to this consideration.

[321] *Gaygusuz v Austria* [1996] European Court of Human Rights App no. 17371/90 [45].
[322] *Koua Poirrez v France* [2003] European Court of Human Rights App no. 40892/98.
[323] *Bigaeva v Greece* [2009] European Court of Human Rights App no. 26713/05.
[324] *Citizens of the Republic of Armenia - Garnik Varderesian, Artavazd Khachatrian and Ani Minasian v the Parliament of Georgia* [2018] the Constitutional Court of Georgia No. 2/9/810,927.
[325] *Dhahbi v Italy* [2014] European Court of Human Rights App no. 17120/09 [53].

Another noteworthy argument invoked by states is the argument of obtaining citizenship to correct the disparity. This line of argumentation The ECtHR considered this argument in the case of *Andrejeva* and stated that

> "the prohibition of discrimination … is meaningful only if, in each particular case, the applicant's personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. To proceed otherwise in dismissing the victim's claims on the ground that he or she could have avoided the discrimination by altering one of the factors in question – for example, by acquiring a nationality – would render Article 14 devoid of substance."[326]

This quote perfectly underlines the flaws of this line of argumentation. Citizenship, as a legal affirmation of belonging, is not a mere formal status, but can constitute a significant part of individual identity and, hence, requiring the disadvantaged to correct the disparity themselves by adjusting and blending into the majority contradicts every known tenet of equality.

This section does not argue that any line of argumentation is flawed and devoid of meaning, but, rather, that broadly construed and generally applicable arguments that work in political dimension, cannot withstand human rights assessment and the equality standards it entails. Therefore, arguments brought forth by states should be contextualized and tailored to the case. Otherwise, without a proper human rights justification, states should obviously avoid appearing in the role of a differentiator.

10.3 Substantively Close, Legislatively Afar

The thesis has adopted substantive understanding of equality as a standpoint for the analysis and assessment. This analysis, rather than being collected in one chapter, has been scattered all over the text and this section does not repeat what has already been said. Instead, it considers the implications of substantive equality standards for the case study findings and the IHRL.

The case study found disparities between citizens and permanent residents in the normative acts that regulate healthcare, social security, access to labour market and economic activities and the implications of these acts are discussed separately within

[326] *Andrejeva v Latvia* [2009] European Court of Human Rights App no. 55707/00 [91].

respective sections. However, to adopt a holistic perspective, these restrictions shall be set into the context.

The number of persons with a permanent residency permit in Georgia is a little more than 20 000 and half of the permit holders live in the capital.[327] Keeping in mind that the whole population of Georgia is around 4 million, this is a considerable number of people, who are subject to the above-discussed restrictions, but, at the same time, not as large to overwhelm the expenditure of the state on social security and healthcare provision, considering that these benefits would be necessary only for a fraction of them in the close temporal proximity. Additionally, as mentioned above, half of permanent residents outside the capital, possibly in rural regions, and, as attested by the Judgement discussed in Section 7.1.2.3, at least some of them reside in high mountainous regions. Through restricting the ownership of agricultural land and excluding them from social benefits, the state is actively forcing them out of their homes.

Furthermore, the analysis also revealed that in many cases the vocabulary employed by the normative acts in the case study is often citizen-centred. In this sense, citizens and their wellbeing are the primary normative objective and, if non-citizens are included, it is done as a secondary consideration. In addition to this nationality driven rhetoric, this tendency is replicated in normative dimension as well: for instance, in neutral social statuses that open the doors of otherwise closed social and healthcare programmes for permanent residents (Section 7.1.2.4). Another example is the evident tendency of including permanent residents mainly in healthcare programmes that are dedicated to the prevention of highly infectious diseases (Section 7.1.1). While the last two represent a positive approach in effect for individual permanent residents, on the other hand, they assign a secondary or even instrumental role for permanent residents as a group.

The thesis also discusses international human rights law and the content of the International Bill of Human Rights and the European Convention on Human Rights. The shortcomings of these instruments individually are already largely covered. However, they also have a collective role and effect as they are positioned above states and dictate standards to national human rights and they can be the last resort for persons whose equality rights are trumped by national authorities. In this perspective, their

[327] 'MIgration Profile of Georgia in 2019' (State Commission on Migration Issues 2019) 42–43 <http://migration.commission.ge/files/mp19_web3.pdf> accessed 7 April 2020.

shortcomings, combined, create unfillable human rights gaps, which are completely dependent on the goodwill of domestic authorities. For instance, the ECHR's superficial approach to equality and complete absence of civil service from its scope, combined with an explicit reservation of public service to citizens, tramples any hope that permanent residents in Georgia might have for advancing their equality right in this area.

The concessions in the conflict, detailed in Sections 3.2 and 10.1, that serve to make human rights operational are understandable and, maybe, inevitable. But it is absolutely crucial that international human rights do not exclude specific areas of equality completely from its scope and do not leave the disadvantaged stranded. Such cases contradict the foundations of equality and, this way, undermine the principle of universality of human rights.

11 Conclusion

Investigating the legal position of permanent residents in Georgia, this thesis found that they are subject to exclusionary regulations in healthcare, social security, labour market and economic activities. These restrictions have implications well beyond formal distinction: through the analysis of, among other issues, the constitutional case of prohibition on agricultural land ownership mentioned in the introduction, the thesis revealed multiple problematic dimensions related not only to equality, but the effectiveness of human rights protective regimes in general. On the other hand, the study also emphasized the close general comparability of citizens and permanent residents, which in most of the discussed areas renders restrictions unjustifiable.

The perspective of substantive equality employed in the thesis further emphasizes the systemic nature of the issues detailed above and helps contextualize and thoroughly analyse the areas of exclusion, as well as their interactions between each other and with the IHRL. While revealing that some areas of exclusion in the legal system of Georgia can be evaluated as against the standards of international human rights law, the thesis additionally details the gaps and insufficiencies within the IHRL itself. At the same time, the thesis pointed to the conflict between the particularistic idea of state sovereignty and the universality of human rights. Delving deeper than merely formal analysis of distinctions, it paid attention to overarching issues such as, for instance, the impact of concessions that the IHRL cedes to state discretion. While the case study method enabled a detailed and thorough analysis of the Georgian legislation, possible avenues for further research could include similar studies on other states, especially from a comparative perspective.

The findings of this study have theoretical and practical significance for the stakeholders interested in this topic: the descriptive part of the thesis can serve to identify the topics to work on for the state authorities in Georgia or the stakeholders on the opposite side of the table. Moreover, theoretical considerations and the analysis of the IHRL can aid researchers or stakeholders in devising policy responses to correct the disparities detailed within the thesis.

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