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# PRINCIPLE OF PUBLICITY IN GEORGIAN CIVIL PROCEEDINGS: A COMPARATIVE PERSPECTIVE WITH SPECIAL REFERENCE TO GERMANY

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# PRINCIPLE OF PUBLICITY IN GEORGIAN CIVIL PROCEEDINGS: A COMPARATIVE PERSPECTIVE WITH SPECIAL REFERENCE TO GERMANY°*

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*Questo saggio intende analizzare il principio di pubblicità e la sua importanza nei procedimenti civili. La ricerca, seguendo un metodo comparatistico, mette a confronto l'esperienza giuridica tedesca e quella georgiana, che della prima è un prodotto, evidenziandone similitudini e differenze, per offrire delle raccomandazioni sui futuri sviluppi del diritto processuale civile della Georgia.*

*The essay aims at analyzing the principle of publicity and its importance in civil proceedings. It discusses some basic issues related to this principle. The research is based on the comparative method with a specific focus on the German experience, since the Georgian law is a product of the reception of the German law. The paper attempts to underline the importance of this principle in civil proceedings and define similarities and differences between the German and Georgian legal systems regarding this principle. All in all, the conducted study makes it possible to draw some conclusions and suggests a few recommendations for the further development of Georgian civil procedure law.*

**Sommario:**

1. Introduction
2. Regulations on Principle of Publicity in Georgian Legislation
3. Georgian Legal Concepts on Principle of Publicity
4. German Legislative and Doctrinal Aspects in Comparison with Georgian Reality
5. Conclusions

"...Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity...".
*Jeremy Bentham*

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° Double blind peer-reviewed paper.

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## 1. Introduction

The principle means a basic rule[2]. A principle we can also term as a legal maxim[3]. Publicity may be considered as an absolute constitutional principle of judicial procedure in any contemporary legal system[4]. But what we mean when we talk about this principle? That means openness, but nowadays, is it really open for everybody? If we say so, the publicity is a possibility for all of us, everybody who is interested should be able to go and watch it. And why do we have this principle in reality? What are the outcomes? The publicity means that everyone is able to watch what is going on in the courtroom during the open hearing proceedings. But is it possible to open doors for everybody? In private law conflicts, where is no public interest and therefore we have only private interest, why should they take place in public mode?

The main goal of this research is to analyze the principle of publicity and therefore highlight its importance in civil proceedings. Because of the limited size of the paper, there is no possibility to analyze each and every part of a wide spectrum of issues that are included in the principle of publicity, so it has been decided to discuss in details only basic issues concerning this principle. Not having the aspiration of being comprehensive, the paper tends to analyze basic theses of the principle trying to answer above stated questions by employing critical attitude to the national legislation. The present research is based on comparative analysis taking the German experience as an example among other ones[5] that has particular importance because of the fact that the Georgian civil procedure law is a product of the reception of the German law.

## 2. Regulations on Principle of Publicity in Georgian Legislation

It is interesting how the idea of publicity has been reflected in the Georgian civil procedural codes for years. Even the Georgian Soviet Social Republic civil procedural code paid attention to this issue in Article 10. As a result of

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[2] See GARNER (ed.), *Black's Law Dictionary*, 8th Ed., Thomson West, St. Paul, 2004, 3777, available at https://www.ethioconstruction.net/sites/default/files/Law/Files/BLACKS_LAW_DICTIONARY_2004_8th%5B1%5D.pdf (Last visited 8 December, 2020).

[3] See the explanation of Maxim *Id*., 3105.

[4] See: CAPPELLI - GARTH, *Chapter 1, Introduction - Policies, Trends and Ideas in Civil Procedure,* in: *International Encyclopedia of Comparative Law, Volume XVI, Civil Procedure,* Mohr Siebeck, Martinus Nijhoff Publishers, 2014, 83-84.

[5] See: GILLES, *Justice System under Critique: A Comparative Analysis from the German Standpoint*, in *Journal of Law*, №2, 2009, Tbilisi University Press, 230 (in Georgian).

comparison of both legislations, it may be said that the current Georgian legal system offers better regulations. First of all, it should be mentioned that soviet legislation considered many exceptions from this principle.

The public character of the proceedings before the judicial bodies as referred in Article 6, Paragraph 1 of Convention on Human Rights and Fundamental Freedoms[6] protects litigants against the administration of justice in secret mode where is no public scrutiny. It is also one of the means to ensure confidence in courts, superior and inferior. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of above mentioned Article 6, Paragraph 1 - a fair trial, guaranteeing of which is one of the fundamental bases of any democratic society, within the meaning of the Convention. Article 6, Paragraph 1 permits restriction exclusively with respect to the public nature of the proceedings and not with respect to the judgment[7]. It is noteworthy that according to the Committee of Ministers of the Council of Europe, the most frequent violations by the Georgian courts found by the European Court of Human Rights concern Article 6, mostly in relation to unfair proceedings[8].

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[6] See the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950, available at https://www.echr.coe.int/documents/convention_eng.pdf (Last visited 8 December, 2020).

[7] See: KORKELIA - MCHEDLIDZE - NALBANDOV, *Compatibility of Georgian Legislation with the Standards of the European Convention on Human Rights and its Protocols*, Council of Europe Information Office in Georgia, 2005, 415, available at https://rm.coe.int/16806f1401 (Last visited 8 December, 2020).

[8] See: *The ECHR and Georgia in Facts & Figures,* European Court of Human Rights, February 2020, 4, available at https://www.echr.coe.int/Documents/Facts_Figures_Georgia_ENG.pdf (Last visited 8 December, 2020). It should also be mentioned how the concept of publicity has been understood by the European Court of Human Rights itself. In principle, litigants have a right to a public hearing because this protects them against the administration of justice in secret with no public scrutiny: *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Civil Limb)*, Council of Europe/European Court of Human Rights, 2020, 75 ff., available at https://www.echr.coe.int/documents/guide_art_6_eng.pdf (Last visited 8 December, 2020). The ECHR has established a rich case law on the contents of the requirement of public hearings and the margin of appreciation that lies with the Contracting States. Some of the most significant cases are: *Axen v. Germany*; *B. and P. v. the United Kingdom*; *Fischer v. Austria*; *Fazliyski v. Bulgaria*; *Le Compte, Van Leuven and De Meyere v. Belgium*; *Martinie v. France* [GC]; *Osinger v. Austria*: KOPRIVICA, *Revisiting the Principle of Public Hearings in the Light of the Ongoing Reform in Germany: Much Ado about Nothing?*, in CLAVORA - BARBER (eds), *Grundsätze des Zivilverfahrensrechts auf dem Prüfstand: 5. Österreichische Assistententagung zum Zivil- und Zivilverfahrensrecht der Karl-Franzens-Universität Graz,* NWV, Wien, 2017, 79, available at https://www.researchgate.net/publication/336994948_Koprivica_Revisiting_the_Principle_of_Public_Hearings_in_the_Light_of_the_Ongoing_Reform_in_Germany_Much_Ado_about_Nothing.pdf (Last visited 8 December, 2020).

According to the constitution of Georgia, court hearings shall be open. Closed hearings shall be permitted only in cases provided for by law. A court judgment shall be declared publicly[9].

Under the Civil Procedure Code of Georgia, in court, all matters shall be heard in open sessions unless this contradicts the interests of confidentiality of state secrets. Matters may also be heard in closed sessions in other circumstances provided by law, based on a substantiated petition of a party. A court shall make a reasoned ruling on conducting a closed hearing. Parties and their representatives, and if required, witnesses, experts, specialists and interpreters shall participate in closed hearings[10].

This is the first wording of this article. By the paragraph, which is added to this norm after the amendments, Photo-, film-, audio-, video or shorthand recording in a court building or during a civil proceeding shall be performed under the Organic Law of Georgia on General Courts[11].

Regulation on this principle is also given in the above mentioned Organic Law. In case of comparison between the Constitution, the Code of Civil Procedure, and the Organic Law on General Courts, it can be drawn the following conclusion: it is the same for those acts that all cases shall be reviewed in open sittings. But it is also possible to see some differences: different from the Constitution, and the Organic Law, the Code foresees permissibility of the closed sittings only in cases prescribed by "legislation" and not by "law". It is interesting what does this terminological difference means. At first glance maybe it means that the Code regulation gives wider possibility to restrict coverage of this principle, because "legislation" is a wider notion than "law". Also in the Code, different from above stated acts, it is not regulated that judgment shall be made public in all cases[12]. It is advisable to have common positions towards these regulations for the real implementation of this important principle.

One of the interesting cases decided by the Georgian courts regarding the principle of publicity is the recent judgment of the Constitutional Court of Georgia in the case of "N(N)LE "Media Development Foundation" and N(N)LE "Institute For Development of Freedom of Information" v. The

[9] See the Constitution of Georgia, art. 62, para. 3, available in English at https://matsne.gov.ge/en/document/view/30346?publication=36 (Last visited 8 December, 2020).

[10] See the Civil Procedure Code of Georgia, art. 9, available in English at https://matsne.gov.ge/en/document/view/29962?publication=134 (Last visited 8 December, 2020).

[11] See the Organic Law of Georgia on General Courts, art. 13, para. 5, and art. $13^1$, available in English at https://matsne.gov.ge/document/view/90676 (Last visited 8 December, 2020).

[12] Cf. art. 62, para. 3 of the Constitution of Georgia, and art. 13 of the Organic Law of Georgia on General Courts, with art. 9 of the Civil Procedure Code of Georgia.

Parliament of Georgia", where the court interpreted art. 62, para. 3 of the Constitution of Georgia and declared that the mentioned constitutional provision establishes an open hearing as a general rule for hearing a case in court. The Constitution of Georgia separates the principle of publicity of court hearings. Such a constitutional solution indicates that the Constitution of Georgia attaches special importance to the transparency of the judiciary and considers it as an operating principle of the judiciary[13].

## 3. Georgian Legal Concepts on Principle of Publicity

First of all, it is important to consider the interpretation of national legal doctrine on this principle, because if it is not envisaged, will be very difficult to make a comparison with foreign experience in this field and then to come to the conclusion.

Principles of civil procedure are fundamental legal ideas, which are the basis for building justice[14].

One of the other important principles is a principle of publicity. It means consideration of individual civil cases on the open court sitting where the presence of the parties and other interesting people is ensured.

Violation of this principle is an absolute ground for reversing a decision[15]. One example of such a violation would be in case of a court, not officially ruling a procedure to be closed, actually giving interested people no possibility to attend the hearing[16].

In the legislation here are some possibilities to restrict this principle. In court, all matters shall be heard in open sessions unless this contradicts the interests of confidentiality of state secrets[17]. A hearing of a case of adoption shall be closed. If a court finds that the adoption is for the welfare and in the best interests of the child, it shall deliver a judgment on the adoption, which shall not be made public at the request of the applicant[18].

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[13] See the abstract of the judgment available in English at https://constcourt.ge/en/judicial-acts?legal=1268 (Last visited 8 December, 2020).

[14] See: KURDADZE, *Consideration of Civil Cases in the Courts of First Instance*, 2nd Ed., "Meridiani" Publishers, Tbilisi, 2006, 57 (in Georgian).

[15] See the Civil Procedure Code of Georgia, art. 394(d).

[16] See: LILUASHVILI - KHRUSTALI, *Comment on the Civil Procedure Code of Georgia*, 2nd Ed., "Law" Publishers, Tbilisi, 2007, 18 (in Georgian).

[17] See: the Civil Procedure Code of Georgia, art. 9.

[18] See: *Id*., art. 350, para. 4, and art. 351, para. 1.

Every individual's private life, a place of personal activity, personal papers and correspondence are inviolable, communication by telephone and other kinds of technical means are inviolable as well. It means that hearing may be held in closed mode for the purpose of protecting this secret, in case of a petition from the parties.

There is a need for issuing an interlocutory order on the proceedings to be held in closed sitting. The court can close the hearing totally or partly and there is a possibility to make a complaint against this. It should be noted, that there is a no regulation in Georgian procedural law about issuing interlocutory orders when a court refuses to make proceedings closed as an answer to the parties' petition. Furthermore, the possibility of the parties to appeal against such refusal is not regulated by law that should be assessed as a fault of the law.

A court judgment shall be delivered publicly. It does not mean that decision, which is obtained at the closed hearing must always be delivered publicly. A decision must be delivered at close sitting if declaring it publicly will contravene the interests for which the proceedings have been made closed.

It is believed that opened sitting has a positive effect on the court, on the participants of the litigation (also on their representatives) and on interested people, because it is realization of public control of the activities of the court, in order to secure civil procedure rules. Protection of this principle is a guarantee for obtaining legitimate and argued decision[19]. Everyone, including the media, can freely attend court sitting. Ensuring publicity for media has a paramount importance. Mass media as a "watchdog" on proceedings, controls court sitting transferring information from courtroom to public. In the closed sitting case is considered according to all rules of proceeding. In this respect there is an interest of protection of legality. Closed sitting does not mean that the proceedings shall be regarded as unlawful *inter alia*. Therefore case will be considered at closed hearing and decision will be declared publicly.

The court should prepare trial so that society will have the possibility to attend the hearing. This is necessary for establishing people's confidence in the court system of their country. It is possible to assess the principle of publicity as an important mean for improving a level of respecting the law and legal self-consciousness of society. People, attending civil proceedings freely,

[19] See: KURDADZE, *Consideration of Civil Cases in the Courts of First Instance*, 80.

have possibility to understand what the law says in their country and in what kind of consequences may result violation of laws as well[20].

## 4. German Legislative and Doctrinal Aspects in Comparison with Georgian Reality

German experience in this field is very significant, because here principle of publicity is consistent with the legal postulate, developed in XIX century, which was directed against the cabinet of Justice[21]. That is why it should be foreseen some interesting points.

In Germany, the public character of court hearings is not expressly required in the text of the Constitution (Grundgesetz); however, the German Constitutional Court has established the idea of a public hearing being an essential element of the right to a fair trial (Articles 20(3) and 28(1) of the German Constitution), and of the principle of democracy (Article 20(1) of the Constitution)[22].

In the German literature, there is a clear distinction between the two variants of publicity in this context: the so-called "direct" or "courtroom" publicity (unmittelbare Öffentlichkeit; Saalöffentlichkeit) under which one understands the admission to the trial as a "live" event, on the one hand; and the indirect publicity or mediated publicity (mittelbare Öffentlichkeit; Medienöffentlichkeit), on the other. The latter therefore signifies access to the events in the courtroom only by means of reports of those who had profited from direct publicity in the first place (most commonly, journalists)[23].

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[20] See: LILUASHVILI, *Civil Procedure Law*, 2nd Ed., "JCI" Publishers, Tbilisi, 2005, 99 (in Georgian).

[21] See: ALEXINA et Al., *Civil Process of Foreign Countries*, Textbook, Moscow, 2008, 27 (in Russian). It is noteworthy that according to contemporary observations, the rapidly ongoing electronification of court procedures, accompanied by more and more so called "e-procedure-law", forces to reconsider nearly all of the trusted procedural principles, including the principle of publicity: GILLES, *Civil Justice Systems and Civil Procedures in a Changing World: Main Problems, Fundamental Reforms and Perspectives - A European View, in Russian law Journal*, 2014 Vol. II (I), 47, available at https://www.russianlawjournal.org/jour/article/view/46/40 (Last visited 8 December, 2020).

[22] See: KOPRIVICA, *Revisiting the Principle of Public Hearings in the Light of the Ongoing Reform in Germany: Much Ado about Nothing?*, 79.

[23] See *Id*.

Publicity of proceedings in the Basic Law for the Federal Republic of Germany[24] stems from the principles of democracy and the rule of law[25]. As it has been shown, this principle is directly and clearly enshrined also in the constitution of Georgia.

It has been met the same purposes of this principle in both countries - to strengthen confidence in justice. In addition, through a notification of the media about the ongoing trial publicity of proceedings is a definite control over the public justice. It would be better if the Georgian doctrine clearly fixes, as does the German provides, that the principle of transparency should be extended to the whole course of proceedings, including research evidence, as well as the announcement of the court decision[26].

A limitation of this principle in the German court proceedings conducted based on two grounds: 1) in order to protect public and personal rights and interests of citizens, and 2) to certain categories of civil cases. It is advisable if will be foreseen by the Georgian legislation those cases when proceedings on the matter or part should be conducted privately in the following situations: 1) the threat to national security, public order and moral principles (the threat of moral corruption), and 2) the threat of life and health of freedom of witnesses or other persons, and 3) to preserve privacy, unauthorized disclosure of which with the help of expert witnesses or threaten punishment 5) during the interrogation of a minor. As it has been seen above, stated conditions are very significant, they are alternative values compared with publicity and it is those cases when it must be made an exception and a limit framework of this principle. The second reason that does not exist in our reality it is an interesting exception from the principle in cases of marriage and family relationships[27].

As for the publicity of announcing the court decision, it is generally recognized that an announcement of the court in any case shall be open and this hypothesis is well known, but in German practice is the presence of preconditions in the case of a tacit trial on first base when the court may grant a special definition of "closed" tacit disclosure of a judicial decision that is known in the theory as an exception to public disclosure under the decision[28].

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[24] See: the Basic Law for the Federal Republic of Germany available in English at https://www.gesetze-im-internet.de/englisch_gg/ (Last visited 8 December, 2020).

[25] See: ALEXINA et Al., *Civil Process of Foreign Countries*, 27.

[26] See *Id*., 28.

[27] See the German Courts Constitution Act, sec. 172, available in English at https://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html (Last visited 8 December, 2020).

[28] See *Id*., sec. 173.

It will be a positive step if the Georgian legislation foresee taking of the court ruling to hold a closed court proceedings at the request of the parties or by court order specifying the reasons as it is in Germany[29].

The advantage of the Georgian legislation is obvious in the case of making photo-, film-, video recording and broadcasting of case hearing. In the Georgian reality it shall be admissible according to the rule established by the court (judge). This right shall be limited by the motivated judgment of the court (judge). As by the German rule the above mentioned not allowed if its purpose is broadcast or publication contents of the hearing and it is acceptable only in case of other purposes (for example, educational purpose) with a resolution of the chairman and the persons involved in the process. In the Georgian reality, since the country is on the difficult way of the justice system's reform and transformation, it is not expedient to have such kind restriction[30] of this principle.

As already noted above, according to the theory of civil procedure of Germany, the principle of publicity is understood in two senses: the principle of publicity (die Öffentlichkeit) as an obligatory principle of justice and the principle of so-called publicity or openness of the parties (die Parteiöffentlichkeit)[31].

As an obligatory principle of proceeding, the principle of publicity means openness of trial for everyone. As the principle of publicity for the parties, it means giving the parties involved in the case law acquainted with the procedural acts and involvement in the investigation of evidence. The above mentioned approach is typical also for Georgian civil proceedings[32].

## 5. Conclusions

As seen above, the principle of publicity has a very big importance in civil proceedings. It is an especially important indicator for the Georgian justice system, which is in a transitional period of the development. The outcome of

[29] See *Id*., sec. 174.

[30] Cf. sec. 172 of the German Courts Constitution Act, with art. 13 of the Organic Law of Georgia on General Courts.

[31] See: ALEXINA et Al., *Civil Process of Foreign Countries*, 29.

[32] Cf. sec. 299, 357, and 760 of the Civil Procedure Code of Germany (available in English at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (Last visited 8 December, 2020)), with art. 83 of the Civil Procedure Code of Georgia.

this principle is very clear - to heighten confidence of the people to their national justice.

Besides, a comparison with the German experience was very productive, because it has been shaped some interesting similarities and differences between the Georgian and German approaches dealing with this principle, which may be helpful to fill legislative and doctrinal gaps in Georgia.

It can be said that it is important to spread the scope of this principle of the private and public interests, because in any case is needful for the society increased confidence in the national justice system.

And finally, hopefully this research will be a small contribution to the improvement of Georgian civil procedure law. Taking into consideration the practical and theoretical nuances related to this principle will allow getting a better practical realization of this maxim in civil proceedings.