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PRIMACY OF REAL LAW OF THE DIVISION OF POWERS PRINCIPLE IN CONSTITUTIONAL ADJUDICATION

"Think of the word 'constitution;' it means structure."

Antonin Gregory Scalia

ABSTRACT

The idea of the Constitutional Court is essentially linked to the constitutional control of the power of state authorities. In the Constitutional judicial history, one of the most important precedents (*Marbury vs. Madison*) happened in the United States constitutional justice, which was particularly regarding the crisis of power division between state authorities. Therefore, at the modern development stage of the constitutionalism, it is important to evaluate the role and significance of the Constitutional Court's competence regarding the competence disputes. It is also necessary to evaluate the European experience in this direction and important and interesting consequences for the constitutional control and constitutional justice within such authority. Consequently, within the framework of this key instrument of constitutional control, we should talk about the primacy of the law, within which the constitutionalism should be developed. This issue has a doctrinal importance and at the same time has a special significance for the development of Georgian constitutionalism. Derived from this, the major constitutional tool for exercising the principle of division of powers should be based on the legal argumentations of the Constitutional Court and it should not be a standard political constraint – a legal instrument prevailing the balancing tools, which of course cannot be exercised without political component, however, the final decision should be made in legal context instead of a political one, ensuring the fundamental and more or less objective basis for the realization of the principle of division of powers. We should also mention that Georgia has still to achieve the political consensus, necessary for constitutionalism and realization of division of powers principle. This is why it is necessary to discuss the particular relevance of the Constitutional Court and generally the law, in direction of the foundational realization of the idea of division of powers.

1. INTRODUCTION

"It is universally recognized that the division of governmental power is one of the fundamental principles of the successful functioning of the state governmental organization and the Constitutional order. This provision, which has been repeatedly confirmed by the doctrine or practice, was reflected in the Article 16 of the 'Declaration of the Rights of the Man and of the Citizen' of France in 1789: 'The state, where there is no division of the governmental power, has no constitution'".[1]

"The well-known lawyer Steinberg correctly pointed out that 'It is an important circumstance when the constitutional reforms are implemented for the first time in the history of the state, constitutional justice is created, especially, when the former legal practice of that state did not deserve any trust.'"[2] The Constitutional Court may have a significant impact over foreign and domestic political activities through resolving competence disputes. This issue is principally related to the sense of common sovereignty, which is assigned to all the governmental branches, including the Constitutional Court.[3] This issue in principle is linked to the common sovereignty, which is attributed to all branches of power, including the constitutional court and, therefore, the court with its jurisdiction ensures the distribution of power by the principle of unity of government. "Major politics was, is and will remain a problem of the Federal Constitutional Court of Germany. From the day of its establishment, the Constitutional Court of Germany has to deal with this issue, since honest people have to make fair decisions on the verge of the politics and justice."[4] As for the Constitutional Court of Georgia, it should primarily be noted, that according to article 82 paragraph 1 of the Constitution of Georgia, judicial power is executed according to the constitutional control, judiciary and other forms determined by law, but in accordance with article 83, paragraph 1, "the Constitutional Court of Georgia is a judicial body of constitutional control."[5] The same constitutional provision is read in article 59 (2) of the amended Constitution, that the Court executes constitutional control.[6] I believe that "this notion may have a broad definition, than just being determined as a constitutional control, because the majority of scientists imply the examination of the constitutionality of the laws and normative acts (M. Nudiel, T. Nasirova, G.

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[1] Kverenchkhiladze G., *Constitutional status of the Government of Georgia* (comment on Article 78 of the Constitution), Contemporary Constitutional Law, book I (article collection), ed. Kverenchkhiladze c. Gegenava D., David Batonishvili Institute of Law, Tbilisi, 2012, 8-9.

[2] Bezhuashvili G., *The Role of Modern International Law in Implementing Georgia's Foreign Policy*, Georgia and International Law (Articles), Tbilisi, 2001, 27 .

[3] Bezhuashvili (n 1) 57.

[4] Getsadze G., 'Constitutional justice and politics?! (On the example of the Federal Republic of Germany)', Georgian Law Review, First Quarter 1999, Tbilisi 74; compared to Uwe Wesel, 'Die Zweite Kreise', die Zeit N40, 1995 j. 29 September.

[5] Constitution prior to the amendments to the Constitution of Georgia of October 13, 2017 and March 23, 2018, which is valid until when the newly elected president takes an oath after the presidential elections of 2018, available here: https://matsne.gov.ge/en/document/view/30346?publication=35 [last accessed on August 1, 2018].

[6] New version of the Constitution as a result of the amendments of the Constitution of Georgia of 13 October 2017 and 23 March 2018 which will come into force once the newly elected president takes an oath after the presidential elections of 2018, available here:
https://matsne.gov.ge/en/document/view/30346?publication=35 [last accessed on August 1, 2018].

Kakhiani). There are also different opinions that do not only refer to the constitutional control as the concept of the legal acts, but also to examine the actions (L. Lazarev), but A. Blankenagel points out that, the constitutional control is the activity directed towards division of governmental power and resolving constitutional conflicts."[7] The most important function of the constitutional control institutions is to consider competence disputes that are directly related to the principle of power separation.[8]

The Constitutional Court may be the sole constitutional body that can solve conflicts among the competent state organs. According to Carl Schmidt constitutional disputes are more political, than legal, while the supreme guarantor of the constitution cannot be the Court, but rather the President.[9] This view has been rejected for some time already; however, the president still maintains the function of the constitutional guarantor. At the same time, the task of the President is to solve the issue, related to the constitutional conflicts between the state authorities and it should be implemented through the application to the constitutional court. [10] Therefore the opinion of having a neutral institution in the system of power division, which will solve constitutional conflicts related to this division, maybe needs to be shared.[11]

So far as the Constitutional Court examines disputes between the political-constitutional authorities,[12] and the political disputes are judged in accordance with the law, it is possible to say, that the law is the only "tool" for the Constitutional Court. However, when the constitutional authorities argue about each other's competences – the legal dispute is inevitably transferred into the political dimension.[13] According to article 89 paragraph 2 of the Constitution of Georgia, it is established that, "the decision of the Constitutional Court is final. An act or a part thereof that has been recognized as unconstitutional shall cease to have legal effect as soon as the respective judgment of the Constitutional Court is made public." Essentially identical text is copied in the new version of the Constitution, however, the new edition offers some addition to the content of the regulation, according to which the normative act or its part loses force at the moment of publishing of the constitutional court decision, unless the relevant judgment envisages a later time frame for invalidating the act or a part thereof. So, it can be summarized say that in the Constitutional Law the Constitutional Court's decision is the sole and final authority, which has the power to be mandatory for everyone. Regarding this issue, the primacy of the law in constitutionalism can be discussed, which, in turn, is a constitutional guarantee of the power division and an unconditional recognition of other ideals and values of the constitution.

[7] Kakhiani G., *Institute of Constitutional Control and its Problems in Georgia: Analysis of Law and Practice*, Thesis. Scientific Supervisor A. Demetrashvili, University Press, Tbilisi, 2008, 24.
[8] ibid 20.
[9] Getsadze (n 4) 75.
[10] Nakashidze M., Peculiarities of Presidential Relations with Government Departments in Semi-Presidential Systems of Management, Scientific Research Demetrashvili Tbilisi 2010, 210.
[11] ibid 218
[12] Political-constitutional organs are meant by the authorities of the authorities directly related to the implementation of the state policy based on their constitutional status.
[13] Getsadze (n 4) 81.

2. THE ESSENCE AND THE BASIS OF THE COMPETENCE DISPUTE

The purpose and essence of the competency dispute is the article 5 paragraph 4 of the Constitution (in accordance with the Constitutional Reform of 2017-2018, the paragraph 3 of article 4 of the Constitution of Georgia envisages the principle of regulating the power separation),[14] ensuring the power separation principle and this mechanism is also one of the basic constitutional and legal guarantees to ensure the horizontal division of power between the highest state authorities.[15] Apart from resolving the conflict between the highest state authorities, the dispute at the Constitutional Court can also arise from the collision of powers between central and local authorities.[16] Despite the multilateral nature of the competence disputes, the classical competence dispute is the one between the highest authorities of the state. The grounds for the competence disputes are defined by the Constitution, particularly article 89 paragraph 1 subparagraph "b" of the Constitution of Georgia (as a result of the Constitutional Reform of 2017-2018 - the same is defined by the article 60, paragraph 4, subparagraph "d"), the Constitutional Court of Georgia consider disputes on competences, which could be in conflict with the functions and competencies attributed to the branch of government by the Constitution.[17]

The essence of the competence dispute is ensuring of the supremacy of the principle for the power division, one of the main constitutional-legal principles and the core ideas of constitutionalism. Constitutional conflicts have often arisen in countries where mixed governance model existed or still exists, more specifically, the semi-presidential model's subtype of Prime-Minister-Presidential governance model, which is currently in force in Georgia. The same political regimes also operate in Poland and Hungary and in the states of Central and Eastern Europe, where power collisions happened in the process of formation of governance systems. Some competence conflicts may arise in the presidential republics, for example the disagreement between the President of the United States and the Congress on the military powers, but the resolution of this dispute was easily accomplished in benefit of the President (Commander-in-Chief) based on the legal nature of the state governance model.[18] Specifical-

[14] The constitutional laws of October 13, 2017 and March 28, 2018, which will come into force after the newly elected president takes an oath after the presidential elections of 2018. Above mentioned reforms have transformed the model of governance-presidential model has been replaced with a mixed governance model, as the combination of the semi-presidential and semi-parliamentary models, and with farther logical transition to a classic parliamentary system.

[15] Kakhiani (n 7) 147.

[16] In Georgia, due to the current legislation, the dispute between the central and local authorities is further expected, because the regulation of this issue is not directly determined by the constitution and depends on the full restoration of the jurisdiction on the entire territory of Georgia.

[17] Competence disputes in doctrinal sources are more widely interpreted, and it includes the separation of competences in the vertical and horizontal context of the powers' division, which is considered within the competence of the Constitutional Court – ibid 146.

[18] Actually only in 1975 During the Mayaguez incident, the conflict arose about the military powers between the President of United States and the Congress, and it was the single exception to the 132 military paradigms.

ly, in Louis Fischer's opinion, the President of the United States can launch the war without the consent of the Congress.[19]

"With or without a constitution, structural conflicts have been pervasive throughout the former Soviet Bloc and, because these conflicts involved constitutional issues almost by definition, they were thrust onto the constitutional courts."[20] The landmark resolutions adopted by the Polish Tribunal includes 1) early cases of a delegation of governmental functions that deal with administrative duties; 2) amendments introduced in the Small Constitution of 1992, concerning the relationship between the Sejm and the Senate relationships; 3) the dismissal of the Chairperson of the radio-television broadcasting board in 1994, which was related to the powers of the President over the governmental bodies; 4) the case of 1994, which concerned the issue of the dissolution of the budget-Sejm, involving a conflict between the President and the Sejm.[21] The first case envisaged the relationship between the government and the cabinet of ministers, in which the government went beyond the scope of the law and settled the matter by its act, but the Constitutional Tribunal of Poland abolished it.[22] Since then, the Constitutional Tribunal has made decisions that strictly adhered to the rule of law and legalized the highest standards in this regard.[23] In Hungary and Poland, the constitutional courts, unlike the Supreme Court of the United States, have been consistently involved in disputes over economic issues; however this involvement was caused by the economic situation in those countries.[24]

Hungary dealt with an interesting case, when the conflict arose between the Prime Minister József Antall Jr. and the President Árpád Göncz. "When there was a meeting in Visegrad, Hungary, with delegations from Czechoslovakia and Poland to discuss relations with Western Europe, Prime Minister Antall sought to go instead of President Göncz, even though it was supposed to be a meeting of heads of state. This issue was smoothed over."[25] Constitutional conflicts emerged after this as well, and those were not easily resolved. The first controversy was caused by the efforts of the Defense Minister to control the armed forces, which was seriously confronted by the President Göncz and his political supporters, but the constitutional court resolved the dispute in favor of the government.[26] It is noteworthy that the Constitutional Court had authority to rule this dispute within the power of interpreting the Constitution and therefore the decision was merely of recommendation force.[27] The practice of the Hungarian Constitutional Court on competence disputes is also worth to mention, when it decided on the case of radio-television board chairman. The dispute concerned the

[19] 'Balance of U.S. War Powers' Council on Foreign Relations, available at: <http://www.cfr.org/united-states/balance-war-powers-us-president-congress/p13092> [last accessed on August 1, 2018].
[20] Schwartz H, *The Struggle for Constitutional Justice in Post-Communist Europe* (Translated by Aleksidze L., Iris, Georgia, Ed. Season, 2003) 112.
[21] ibid.
[22] ibid, p. 113.
[23] ibid, p. 114.
[24] ibid, p. 117.
[25] ibid, p. 149.
[26] ibid, p. 149.
[27] ibid, p. 415.

authority and the procedures of appointing this official and the parties were the Prime-Minister and the President, again, the decision was made in favor of the Government of Hungary.[28]

It is also possible within the introduction to the disputed functions to consider the issues of appointment of officials generally or even specifically. The mentioned belongs to the list of cases, where there is high probability of development of disputes regarding the Constitution, as we have observed the practice in Poland and Hungary. Similar cases were observed in Georgia as well, when the dispute was characterized with significant political content.[29] I believe that one of the main objectives of constitutional justice is the authority of the constitutional court to adjudicate the competence dispute between the relevant subjects and thereby facilitate the development of the idea of constitutionalism and the principle of separation of powers in the country. Therefore the Court should be equipped with all relevant tools to resolve the disputes of this category.

3. THE SCOPE OF COMPETENCE DISPUTES

A competence dispute has to be understood broadly because the formal grounds for reviewing competence disputes are inadmissible and contrary to the idea of constitutional justice. A court dispute could be conducted directly through the interpretation of and within the constitutional provisions. Although the dispute between the competent authorities may also arise in relation to matters not directly defined by the Constitution, but that carry the constitutional content. I believe that in this case the Constitutional Court must substantially examine and solve the problematic issue, through wide interpretation of the constitutional provisions, including in conformity with the specific definitions of the norms providing the model of state governance. Therefore, the Constitutional Court must be the main institution, which determines how the powers should be divided pursuant to the classifications of specific governance model, within its adjudication process. Although the definition of state

[28] See Schwartz (n 20) 120.

[29] The diplomatic content of political content was broad in Georgian political reality, including the example of which was particularly relevant to the signing of the Association Agreement between Georgia and the European Union signed on June 27, 2014. This was partially expressed in the academic circle. In this context, the following concepts were expressed: "Discussion on this issue [the issue of signing the Association Agreement] would be considered to be complete, the dispute had to be decided on the competence of the Constitutional Court and not when the Prime Minister announced the issue closely. The constitutional dispute should be initiated by the President on the competence of the competence. If such a president is judged as a manifestation of legal and political culture in the legal state, such a move in Georgia will be considered "political split" or "rising presidential ambitions.", See *Liberali* Blog <http://liberali.ge/blogs/view/5903/ra-mnishvneloba-aqvs-vin-moatsers-khels-evrokavshirtan-asotsirebis-shetankhmebas>;
There were also clearer opinions regarding this issue, the President of Georgia has the primary competence of signing the Association Agreement. This is the logic of the constitution. Nevertheless, discussion on this topic has been renewed once again." – See *Liberali* Blog <http://liberali.ge/blogs/view/5889/vin-unda-moatseros-kheli-asotsirebis-khelshekrulebas> [last accessed on August 1, 2018].
In addition to this issue, broader public opinion polls have been interviewed so much about the current political issue. See *Transparency International Georgia* Blog <https://www.transparency.ge/ge/blog/evrokavshirtan-asotsirebis-shetankhmebas-kheli-sakartvelos-prezidentma-unda-moatseros> [last accessed on August 1, 2018].

governance model should be the function of other state institutions or commissions, but in this case it is necessary that the Constitutional Court has its own position on this matter, allowing it to systematically decide the problematic cases, so that the incoherent solutions of the problems within the system do not arise new concerns. At the same time, the polemic about the essence of the governance regimes must not carry only the theoretic significance and cannot only be considered in the process of formation of the Constitution.

3.1. The Subjects of Competence Dispute

In the constitutional jurisdiction the parties of the competence dispute are those constitutional bodies and persons, who have been granted the right to bring such cases in front of the Constitutional Court of Georgia in accordance with the Organic Law and the Constitution, specifically, the articles 33-40 of the Law on Constitutional Court.[30] As for the competence disputes, this issue is regulated by article 34 of the same law, which sets out the determination of the applicant and the subjects of the claim and regulates the legal status of the respondent.

The subjects in the competence disputes are the main participants of the constitutional jurisdiction, who dispute the competences and, therefore, they represent the governmental bodies and the constitutional officials. In the Constitutional Court, the subject of the dispute can only be the authority or the official listed in article 89 of the Constitution of Georgia. The subjects, referred to in article 89 paragraph 1 of the Constitution, are: the President of Georgia, the Government of Georgia, at least 1/5 of the members of the Parliament of Georgia, t supreme representative bodies of the Autonomous Republics of Abkhazia and Ajara, self-government representative bodies - Sakrebulos, the High Council of Justice, the Public Defender.[31] Pursuant to the Constitution and the Organic Law on the Constitutional Court, the head of state is also equipped with a universal authority and, in a way a function, to appeal to the Constitutional Court and request the adjudication of the case, regardless whether the competence falls within his authorities or the authorities of other state bodies. The above mentioned stems from the function of the President as the guarantor of the Constitution, which is not literally read in the text of the Constitution, but through the oath the President undertakes the responsibility of protecting the Constitution. Additionally, the mentioned function also is derived from the catalogue of authorities of the President with regards to the constitutional adjudication. The President is entitled to submit the matter to the Court for almost all competencies of the Constitutional Court, as for other subjects, the organic law indicates towards those institutions, which are listed in article 89 and states, that these bodies are entitled to address the Court when they consider their authorities to be violated by other branches of government. The authority of universal applicant is also entrusted to the one

[30] Kakhiani (n 7) 197.
[31] The Constitution of Georgia (04.10.2013) <https://matsne.gov.ge/ka/document/view/30346>, [last accessed on August 1, 2018].

fifth of the members of the Parliament of Georgia, if they believe that the scope of the competence of the Parliament or of other state institution has been violated.[32]

The Law does not clearly define the issue of the respondent in such cases. Although the respondent in this category of disputes has to be the governmental body, which has issued a normative act (article 34, paragraph 2 of the Organic Law),[33] the matter who the respondent shall be, when there is no normative act at hand, instead the dispute covers the individual constitutional act or action, remains vague. Such instances are not unequivocally exempted and pursuant to the Constitution may even be envisaged as a subject matter of the dispute. Therefore, it can be stated that the claimant should define who the respondent should be. The Law and the Constitution is also ambiguous regarding the exhausting and comprehensive list of claimants or respondents for the disputes of this category, since, as mentioned above, the Organic Law merely indicates towards the article 89 broadly (after the new version of the Constitution comes into force, the indication will be made towards article 60) and does not precisely points to the specific subjects, which are able to address the Court within relevant authority. Article 89 lists the institutions of the highest state governance and the local self-governance, as well as the High Council of Justice, the Public Defender. It should be primarily stated that the capacity of addressing the Court of these bodies is unforeseeable, additionally, I believe, that article 89 does not envisage certain constitutional institutions which may face the need to commence competence disputes to safeguard their own authorities, including the State Audit Service,[34] the National Bank of Georgia, National Security Council and others, the competences of which are directly prescribed by the Constitution. The current practice of the Constitutional Court of Georgia also clearly demonstrates the problem related to the claimant's powers, since the case is brought not by the directly relevant subject, but another one. For instance, the Constitutional Court has decided to hear the merits of the case arisen from the complaint of a group of members of the Parliament of Georgia, disputing the constitutionality of the amendments of the Organic Law on the National Bank of Georgia, which pursuant to the claimants, was in violation of the constitutional guarantees of the independence of the National Bank, this claim has been adopted for hearing on merits by the Record Notice of the Plenum N3/6/668 of October 12, 2015, however the judgment has not yet been adopted.[35] Based on the above mentioned it is clear that the constitutional adjudication and resolution of the competence disputes cannot be made faultlessly without relevant parties, especially the claimant. This is why it is more appropriate for the constitutional bodies not to have the authority to bring claims to the Court without limitations. Therefore the provision of the new version of the Constitution, specifically article 60 paragraph 4

[32] The Organic Law of Georgia on the Constitutional Court of Georgia (29.05.2015) <https://matsne.gov.ge/ka/document/view/32944> [last accessed on August 1, 2018].

[33] By the opinion of the applicant, The defender is the state agency, whose statutory act has violated its constitutional competences-The Organic Law of Georgia on the Constitutional Court of Georgia (29.05.2015) <https://matsne.gov.ge/ka/document/view/32944> [last accessed on August 1, 2018].

[34] Within the framework of the 2013-2015 Constitutional Commission, the proposals were also considered to include such powers as an institutional formation of independent constitutional organs.

[35] By the record of N3/6/668 dated October 12, 2015 <http://constcourt.ge/ge/legal-acts/recording-notices/saqartvelos-parlamentis-wevrta-djgufi-zurab-abashidze-giorgi-baramidze-davit-baqradze-da-sxvebi-sul-39-deputati-saqartvelos-parlamentis-winaagmdeg.page> [last accessed on August 1, 2018].

subparagraph "d", stating that the Constitutional Court reviews disputes about the competences of a respective body on the basis of a claim submitted by the President of Georgia, Parliament, the Government, the High Council of Justice, the General Prosecutor, the Board of National Bank, the General Auditor, the Public Defender or the supreme representative or executive body of an autonomous republic, in conformity with the Organic Law, is valuable change.

3.2. The Object of Competence Dispute

The Constitution of Georgia defines the authorities of the Constitutional Court prescribing the scope of competencies for adjudicating the dispute within the constitutional jurisdiction. According to the Constitution, the rules for the dispute resolution at the Constitutional Court are determined by the Organic Law. The Organic Law of Georgia "On the Constitutional Court" is the document allowing us to discuss the subject of the dispute, which may become the topic of consideration for the Constitutional Court.

The constitutional claim concerning the dispute over the competence between the state authorities, pursuant to the Organic Law of Georgia on the Constitutional Court of Georgia (paragraph 2 of article 23 and paragraph 2 of article 34), has to be examined by the Constitutional Court, if the breach of competence relates to a normative act.[36] The normative act clearly represents the subject of a possible dispute, but in addition to such act, there are no other objects of the dispute envisaged by any legislation. However, if one analyses the text of the Constitution, the dispute may arise on any matter, even if it does not concern the normative act.

The President of Georgia has the ability to raise the claim at the Constitutional Court disputing the abovementioned provisions currently in force from the Law of Georgia "On the Constitutional Court of Georgia" with regards to the constitutional provision in force, arguing that the disputed provisions prohibit the President to apply to the Constitutional Court by limiting this competence with the claims on normative acts only.[37] However, the mentioned tool, which could establish the constitutional "verity" through the Court, can only be hypothetical; I believe it is more essential to carry out a dispute not only with regards to establishing the constitutionality of a normative act, but within wider and more comprehensive process, in order to apprehend the problematic topics in the constitutional practice. In this way, the dialect of constitutionalism will proceed within the established forms. There is an opinion that the constitutional court should only adjudicate on the disputes on normative acts with the legal grounds, i.e. so called "matters of law" and not the actions or legal relations. In particular, pursuant to the doctrinal opinion the "differentiation of subjects subject to

[36] The Organic Law of Georgia on the Constitutional Court of Georgia (29.05.2015) – <https://matsne.gov.ge/ka/document/view/32944> [last accessed on August 1, 2018].

[37] In this case, all such subjects, who may be the claimant of this type of dispute, are eligible to make such a request.

constitutional justice is relatively simple to be carried out not by a circle of public relations or their importance, but with a 'normative scale.'"[38] I believe, that it is not be appropriate to make such conclusions, even when the Constitutional Court examines the constitutionality of actions within other powers, including when the matter concerns the understanding of the impeachment and/or termination of the authority of the Member of Parliament. In both cases, the Court actually discusses the circumstances of the case and makes a decision thereof.

There are legal relations that can be considered neither by the general courts nor the Constitutional Court, since the current constitutional system does not allow the claim to be raised in these institutions unless it envisages the dispute over the normative act. In this instance, the existence of body, conducting the checks, is necessary; since a "specialized body"[39] in the form of the Constitutional Court exists in Georgia, it is worth for it to be the one overseeing all cases related to constitutional control. In practice of the Supreme Court of Georgia there was the case (K. Davitashvili's case), when the MP of the Parliament challenged the order N286 of the President of Georgia, issued on March 15 2003, which was a call for extraordinary session of the Parliament. The Court did not hear the case on merits, because, according to its decision, the act was not administrative-legal act, but represented the political act issued according to the Constitution, assessment of which was beyond the competence of the Court. The Supreme Court stated that if it heard and decided this issue, the Court would violate the principle of separation of powers (the Supreme Court of Georgia, May 22, 2003, Judgment N3გ-ად-440-კს-03).[40] Thus the Supreme Court did not accept for consideration the case related to the individual constitutional-legal act. Regardless of this disputable judicial assessment, one has to rely on the same opinion that the dispute arising from constitutional law should better be considered by the Constitutional Court, due its specific nature and due to the direct and high level of the competence the Court holds.

4. The Rule of Examination of Competence Dispute and The Enforcement of Decision

The Constitutional Court decides on competence disputes through the complaint-based procedure. The Constitutional Court reviews the competence disputes in accordance with the Organic Law of Georgia the Constitutional Court (paragraph 2 of article 21), usually with a collegial composition and not through the Plenum.

The satisfaction of the constitutional claim on the issue of competence disputes leads to invalidation of the disputed normative act from its enactment.[41] There may also be a multi-

[38] Khubua G 'Constitutional Court Justice and Policy', Review of the Constitutional Law, N9, 2016, 8, - available at: <http://www.constcourt.ge/uploads/other/3/3803.pdf> [last accessed on August 1, 2018].
[39] Generally there are specialized and non-specialized constitutional courts. The specialized body is the one, whose field of principal activity is constitutional control, Kakhiani (n 7) 32-33.
[40] *Decisions of the Supreme Court of Georgia on administrative and other categories of cases* Jorbenadze S (ed), (Sani, Tbilisi, July, 2003, N7) 1769-1773.
[41] The Organic Law of Georgia on the Constitutional Court of Georgia, article 23, paragraph 2.

lateral constitutional dispute in the Constitutional Court when there are several applicants and/or respondents to specific competences. Additionally, it can be said that the person involved as the respondent is not necessary to be the subject issuing/adopting the contested normative act. In this context, the constitutional conflict can be understood as a result of legal and factual relations and not only a dispute on the basis of a normative act.

The decision of the Constitutional Court of Georgia is a self-executive act and the compliance thereof is mandatory.[42] It is a legitimate definition of the constitution, where the consideration of the Constitution widely or narrowly is within the margin of appreciation of the Constitutional Court, even for the simple reason, that the Court is the sole and the highest institution, whose decision-changing mechanism remains in its hands.[43] Therefore, respecting and executing the decision of the Constitutional Court is the duty for all state institutions. However, Georgian legislation provides for certain mechanisms and important legislative safeguards in order to protect the decision of the Constitutional Court. Organic Law of Georgia on Constitutional Court, in particular, article 25 paragraph 4^1 provides, that in case the Constitutional Court determines that a disputed normative act or its part contains the same standards that have already been declared unconstitutional by the Constitutional Court, it shall deliver a ruling on the inadmissibility of the case for consideration on the merits and on the recognition as void of a disputed act or its part. In the practice of the Constitutional Court there are cases, when the Court has made such decisions.[44] However, I believe, that such legislative guarantee should be directly prescribed in the Constitution in order to protect the priority and the primary nature towards political decision making of the legal decision.

Under the three-fold division of state powers, the judiciary is, of course, involved in the division conflicts. In Poland, the relationship between Sejm and the Constitutional Tribunal have been particularly complex, as *de jure* the decisions rendered by the Tribunal on the unconstitutional nature of the law were not final.[45] The Polish Sejm did not carry out the execution of the tribunal decisions for a certain period. However, the Tribunal, by its practice, determined, that the law, which is not be enforced by the Parliament, would be automatically deemed void after six months.[46] Another interesting practice was established by the Constitutional Tribunal when it considered that Sejm had no authority to overcome the decision of the Constitutional Tribunal regarding the act adopted without the signature of the President.[47]

In this case, it is also noteworthy that if we consider not only the normative act as a possible object of dispute in the Court, but also any other constitutional-legal act or action or omis-

[42] Nakashidze (n 10) 226.
[43] The Constitutional Court can overcome its own practice, but in this case it is necessary to make such a decision by the plenum.
[44] Judgment of the Constitutional Court of Georgia 14 December 2012 No. 1/5/525 Moldovan citizen Mariana Kiku against the Parliament of Georgia. The Judgment of the Constitutional Court of Georgia of 24 June 2014 1/2/563 Austrian citizen Matthias Huter against the Parliament of Georgia.
[45] Schwartz (n 20) 119.
[46] ibid 120.
[47] ibid.

sion of a competent authority, the issue may become problematic in part of its enforcement. On the one hand, it is true that the decision of the Constitutional Court is self-enforceable and, as a rule, does not lead to additional legal actions, on the other hand, in case of such competence dispute, the annulment of an overruling constitutional act can be somewhat ineffective without substantial review. Since when the dispute concerns a specific action, it may be difficult to assess if an action leads to the same legal consequences. Thus, this process will resemble "real constitutional control",[48] which will result in the increase of such constitutional disputes at the Constitutional Court, while the Court cannot avoid hearing and adjudicating all these types of cases. Consequently, such regulation will unequivocally lose the positive effect that is the function of the abovementioned norm, the public interests to be safeguarded, the state and judiciary resources to be saved, the economy of the proceedings to be achieved and, most importantly, the guarantees of the enforcement of the Constitutional Court decision to be standing. The enforcement of the decision of the Constitutional Court will change and the parties to the constitutional dispute will be subject to different legal conditions. Despite the possible complications, this competence should be widely understood in order to implement the constitutional principle of the division of power in all forms and means.

In Poland, Lech Walesa tried to circumvent from a decision of the Constitutional Tribunal in the case of "TV and Radio Broadcasting" in 1994,[49] arguing that the decision of the Tribunal had no retroactive force, but in 1995 the same Constitutional Tribunal expounded that its decision usually acted within the retroactive effect as well.[50]

5. THE PRACTICE OF THE CONSTITUTIONAL COURT OF GEORGIA

In legal literature, it is considered that in the common law states the court decision is a law-application; however, in certain instances it also is the source of law as a precedent, unlike the Roman German system, where it only carries the nature of application of law. However, the decision of the Constitutional Court, with its executional effect and the legal nature, can be deemed as a source of law as well, while on the other hand, the general court can only use it for argumentation in the judgment, as the Constitutional Court hold merely the function of negative legislator.[51] It is possible to say that René David's opinion that "the judge should

[48] It is important for the composition of the Constitutional Court to implement the "real" constitutional control. Until now the doctrinal staff: judicial self-restraint, political question doctrine, "abgestufte Verhältnismäßigkeitskontrolle", "Beck'sche Formel", "Schumann's Formel" etc.) and the most difficult process are considered, constitutional control The object (compliance with the Constitution, and not the hierarchical balance between the legislative and general normative acts in the control of the law enforcement process) Asshtabebis and specify the quality of the constitutional judges in the proceedings, in this case the (,, real "constitutional control) <https://emc.org.ge/ka/products/normatiuli-sakonstitutsio-sarcheli-rogorts-konkretuli-sakonstitutsio-kontrolis-arasrulqofili-forma-sakartveloshi >, [last accessed on August 1, 2018].

[49] The president of the TV and Radio Broadcasting Director was considered an exemplary rule.

[50] Schwartz H (n 20) 117.

'[51] Marinashvili M and Gelashvili N, ;Place of the Decision of the Constitutional Court in the System of Justice', Justice No. 3, Tbilisi, 2007, 167-170.

not become a law-maker in countries of Roman-German legal system,"[52] cannot be applied to the Constitutional Court. This is why the judgment of the Constitutional Court has extremely high relevance. It can be said that the legislator is indirectly guided by its rulings,[53] when it makes a decision and it also considers, whether a specific legislative or other normative act may later become subject of dispute at the Constitutional Court.

Georgia's Constitutional Court does not have vast experience in competence disputes. However, we may partially agree with the opinion expressed in the literature that the purpose of competence disputes to safeguard the principle of separation of powers, is carried out by the Constitutional Court with respect to other competences.[54] In this regard, several decisions of the Constitutional Court of Georgia may be considered.[55] For instance, the decision of May 25, 2004 by which the Constitutional Court deemed the declaration of state of emergency by the Autonomous Republic of Ajara unconstitutional, when the dispute was between the MPs and the Head of the Government of the Autonomous Republic of Ajara. The Constitutional Court unanimously established that in accordance with article 3 of the Constitution of Georgia, announcing the state of emergency falls within the exclusive competences of the higher state government. Consequently, the Constitutional Court annulled the Order of the Head Autonomous Republic of Ajara issued on January 7, 2004 and the normative grounds that allowed issuance of such acts within the Autonomous Republic. But in this case the basis for referring to the Constitutional Court by a group of MPs was not sub-paragraph "b" of article 89 of the Constitution of Georgia, but subparagraph "a" of the same paragraph; the competence dispute focused on the violation of the principle of vertical division of powers and not the principle of horizontal division.

Although the Constitutional Court of Georgia does not have practice regarding the separation of powers between the President and the Government, there is some experience in general regarding the competence disputes within the article 89 paragraph 1 subparagraph “b” of the Constitution of Georgia, in particular the case between the members of the Parliament of Georgia and the Ministry of Education of Georgia.[56] In the dispute a group of Georgian MPs disputed the constitutionality of the Order the N469 of September 30, 1997 of the Minister of Education of Georgia that determined the co-funding rule for pre-school, primary and secondary school education, while the group of MPs pointed out that this was contrary to article 94 of the Constitution of Georgia, envisaging that any kind of tax or fee could only be imposed by the law. In this case the Ministry of Education violated the Constitution and was intruding in the competence of the Parliament of Georgia. Since the matter was regulated by the Minister's Order, the Constitutional Court was unable to render a decision as the proce-

[52] David R, *The legal system of Modernity* (Tbilisi, 1993) 125.
[53] Legislation does not mean only legislative authorities, but everybody receiving or issuing a normative act.
[54] Kakhiani (n 7) 22.
[55] Decision of the Constitutional Court of Georgia 25 may, 2004 No. 15/290,266 <http://www.constcourt.ge/index.php?lang_id=GEO&sec_id=22&id=119&action=show >, [last accessed on August 1, 2018].
[56] Judgment of the Constitutional Court of Georgia of 29 January 1998 №1/1/72-73 <http://www.constcourt.ge/index.php?lang_id=GEO&sec_id=22&id=84&action=show>, [last accessed on August 1, 2018].

dure for adoption of this normative act was violated and it could not be regarded as a normative act, and thus could not be adjudicated. Although the Court should have expressed more boldness, as the Constitutional Court takes into account not only the formal nature of the act but also its contents; the Constitutional Court avoided making a decision on this matter. Therefore, it is important, that all categories of disputes are considered essentially in terms of competence dispute, regardless whether or not a normative act is at hand. It is principal that all constitutional legal acts and constitutional legal real-acts (actions) become justiciable within the competence dispute, otherwise the real power of separation cannot be realized through constitutional justice.

Additionally, the expression of institutional conflicts was the judgments of the Constitutional Court No.3/122,128 of June 13, 2000 and No.6134-139-140 of March 30, 2001, when inn both disputes the applicant was a group of Members of the Parliament of Georgia, while the respondent was the Central Election Commission. Apart from this, there are several judgments related to the competence dispute at the Constitutional Court, namely, the decision No.2/53/1 of April 10, 1998, which demonstrates that the Members of the Parliament of Georgia disputed the competency issues of the Ministry of Finance.[57]

The decision of the Constitutional Court of Georgia dated November 9, 1999, No.1/7/87 should also be mentioned. The issue at hand was between the Members of the Parliament of Georgia and the President of Georgia, with applicants claiming that the latter violated his competence. The grounds for filing a claim were also within the subparagraph "b" of paragraph 1 of article 89, *i.e.* "a classical competence dispute", however, this time the Constitutional Court "dodged the responsibility" indicating that the issue of the dispute – the President's ordinances, – were adopted prior to the adoption of new Constitution, consequently, the Constitutional Court clarified that there was no normative act at hand in that case, since such a decision had not been taken by the Minister of Justice. In this case, based on the formalities of the matter, the Constitutional Court avoided rendering the relevant judgment as well.[58]

The practice of the Constitutional Court includes little number of decisions on competence disputes. Specifically, the Constitutional Court's statistics state that in total five constitutional claims have been submitted to consider the constitutionality of normative acts under article 89 paragraph 1 subparagraph "b" of the Constitution.[59] Therefore, it can be said that the separation of power in Georgia is not implemented through constitutional justice, not just because the cases are not submitted to the Court, but also because the Court has obviously

[57] <http://www.constcourt.ge/index.php?lang_id=GEO&sec_id=23&id=277&action=show> [last accessed on August 1, 2018].
[58] <http://www.constcourt.ge/index.php?lang_id=GEO&sec_id=23&id=280&action=show > [last accessed on August 1, 2018].
[59] See statistical data, available at: <http://constcourt.ge/album/stat/9.gif> [last accessed on August 1, 2018].

been avoiding adjudicating of this issue. “[T]he state’s impotence in settling frictions among its various organs will in the end endanger security and, in this way, freedom.”[60]

The Supreme Court of the United States has never tried to avoid conflicts among the branches of state government. The doctrine of separation of power was recognized in 1787 not to encourage their efficiency, but to prevent them from arbitrariness. The goal was not to avoid disagreements, but to protect people from autocracy, through the inevitable disagreement of the division of power into three sections.[61] In the USA there is a "political question" doctrine, according to which the Supreme Court of the United States may refuse to consider the case where "the issue is political". In practice, the Supreme Court basically refuses to discuss foreign policy issues. The American doctrine of "political question" is less common in Germany and continental Europe. The German Constitutional Court developed its own doctrine of political question.[62] The Federal Constitutional Court of Germany does not distinguish the issues that are not subject to judicial review due to political content. At the same time, the German Constitutional Court does not avoid adjudicating the politically relevant issues that may have high impact on the political system. It can be stated, that the Constitutional Court of Germany became an important state factor in political life. “Decisions of the Constitutional Court define the frameworks of the government not only for individual cases, but also for politics and they not so rarely affect the content of the politics."[63] Thus it can be said that Georgia, as a country of continental law system, has to share a great deal of European experience and the issues of so called "political question" should be adjudicated within the Constitutional Court more actively, of course, in the event of the existence of adequate preconditions.

6. Conclusion

Competence dispute is an inevitable solution for the division of power and for ensuring its flawless realization, which is more established in semi-presidential and in classic parliamentary systems of mixed governance models, where the functions of state power bodies are not strictly divided and it is less common in states with government powers rigidly divided.

It can be said that the dispute between the high bodies is a natural constitutional phenomenon and should not be treated as a crisis in the functioning of the government, on the contrary, all the bodies should be determined to try to eliminate such incompatibilities of governing functions within their competence, the resource of the Constitutional Court should particularly be applied in such instances.

[60] Sajo A., *Limiting Government: An Introduction to Constitutionalism* (Translator Maisuradze M., Scientific Editor T. Ninidze, Tbilisi, 2003) 92.
[61] ibid 92-93. Compare *Myers v. United States*, 272 U.S. 293 (1926) (J. Brandeis, dissenting).
[62] Khubua (n 38) 5.
[63] ibid.

It is notable to state, that the subject of constitutional dispute should be all state institutions holding constitutional status, the ability to be the subject shall be also understood as the role to be the applicant or the respondent within the dispute. It is fulfilling that the amendments of the Constitution have specified the authority to raise the claim and the competence of all constitutional bodies have been clearly and distinctly recognized, however in practice the role of activism from the Head of State and collaboration in disputes is relevant. As for the issue of respondent in these disputes, - it is linked with the object of the claim, whereby it is notable, that the current legislation needs to be revised in order to allow claims related not only to the normative act, since such construction is both defective and improper.

The Constitutional Court should adjudicate the competence disputes fully and decide all hypothetic events as well, including the disputes on normative and non-normative individual acts, as well as constitutional actions. Relevant interest, in the event of its existence, should be disputable at the Constitutional Court, due to the qualification of such dispute, as well as the fact, that legal tool for its resolution is within the Constitutional Court.

The execution of the judgment of the Constitutional Court is significant, since the constitutional dimension of the primacy of law is created through the self-execution nature of the judgments adopted through constitutional adjudication and the safeguards existing within the Constitutional Court for these judgments. Additionally, the Court should in all matters envision the issues widely and when deciding on the case argue generally based on the governance model of the state, which could be the degree of argumentation and a certain legal test.

When assessing the practice of the Constitutional Court generally, it should be noted that the competence disputes are not actively heard, although there have been the attempts to use the resources of the Court for this direction. It has not been fully successful in practice, however, I should be stated, that it is relevant for the future the body of constitutional revision to play real and decisive role for such disputes.

In summary, it can be said, that it is of particular relevance to put the practical side of state constitutional organization within the frames of the law and to develop the idea of constitutionalism within this legal primacy and thereby realize the principle of separation of powers, where the special and leading role is carried out by the relevant constitutional body, the Constitutional Court, equipped with appropriate competences to ensure the steady development and full realization of the principle of power separation.