

CONSTITUTIONAL LIMITS OF DELEGATION OF THE LAW-MAKING COMPETENCE

ABSTRACT

The exercise of legislative authority and, consequently, the determination of the country's policy while regulating public relations, constitutes the constitutional prerogative of the direct representative of the people - the Parliament. Nevertheless, considering the extensive nature of legislative activities and the intricacies of contemporary governance, there are instances where entrusting legislative functions to the executive branch becomes unavoidable. In scholarly literature and judicial practice, the delegation of the law-making function seldom sparks dissent. Although the extent and scope of delegation itself are permissible for constitutional purposes, it remains a subject of fervent debate.

The Constitutional Court of Georgia has also established specific standards concerning the delegation of law-making competence. However, judicial decisions on this matter are not abundant. This paper is dedicated to exploring the delegation instrument and analyzing relevant international standards.

I. INTRODUCTION

In contemporary states, instances of the delegation of law-making competence to the executive power have proliferated. It is deemed an unavoidable mechanism for the efficient implementation of governance.¹ The impermissibility of authority delegation may overwhelm the Parliament, and a prohibition motivated by the protection of fundamental rights might undermine the same objective. The persistent practice of delegation also jeopardizes various constitutional principles. While judicial oversight of delegated legislation exists, the courts, when faced with executive discretion, wield a limited influence at best.² Consequently, it is crucial to scrutinize the extent to which placing legislative activities in the hands of the executive branch is acceptable.

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¹ András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press 2017) 260.

² *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) <<https://supreme.justia.com/cases/federal/us/467/837/>> [last accessed on 15 July 2023].

In the Constitutional Court of Georgia's practice, the constitutional boundaries of the delegation of the legislative function are not distinctly defined. The court elucidated the essence of delegation for the first time in decision №3/3/763 of July 20, 2016.³ Thus, prior to this decision, there were no constitutional standards in practice by which legislative activity could be delegated to another body. At the same time, following the mentioned decision, amidst the evolution of court practices, the established standards were gradually expanded and reshaped, although definitive answers to some fundamental questions are still pending.

The paper examines the goals of delegating law-making activities from the Parliament to the executive power, the risks associated with broad delegation, and the factors that define the constitutional boundaries of delegation. The article underscores the challenges observed in the Constitutional Court's practice and proposes suitable solutions. In addition to examining the practices of the Constitutional Court of Georgia, the paper discusses the standards established by other countries, specifically addressing the limits of legislative delegation to the executive authority for the regulation of issues governed by law.

II. THE LAW-MAKING FUNCTION OF THE LEGISLATIVE AUTHORITY AND THE ROLE OF THE EXECUTIVE AUTHORITY IN THE PROCEDURE FOR ADOPTING A LAW

The scope of competence of the legislative body varies across countries based on the state governance model. In some systems, the parliament not only creates the government but also oversees its activities, establishes the country's policy, and elects/appoints certain officials. Conversely, in other systems, the parliament may lack some of these competences, though all parliaments share the common feature of performing a legislative function.⁴

According to the Constitution of Georgia, "People are the source of state authority. People exercise power through their representatives, as well as through referendums and other forms of direct democracy."⁵ As outlined in the Constitution of Georgia, "The Parliament of Georgia is the supreme representative body of the country that exercises legislative power, defines the main directions of the country's domestic and

³ The decision of the Constitutional Court of Georgia on case №3/3/763 "Group of members of the Parliament of Georgia (Davit Bakradze, Sergo Ratiani, Roland Akhalia, Giorgi Baramidze et al., a total of 42 members of the Parliament) v. the Parliament of Georgia", 20 July 20 2016.

⁴ András Sajó and Renáta Uitz, *supra* note 1, 256.

⁵ Article 3, paragraph 2, Constitution of Georgia <<https://www.matsne.gov.ge/ka/document/view/30346?publication=36>> [last accessed on 10 February 2023].

foreign policies, controls the activities of the Government within the scope established by the Constitution, and exercises other powers.”⁶ Hence, as per the Constitution of Georgia, the constitutional mandate to determine the primary directions of the country’s development rests with the representatives elected by the people. Consequently, the execution of legislative power, i.e., law-making activity, falls within the constitutional competence of the Parliament of Georgia.

The Constitution of Georgia also delineates the mandate of the government, stating that, “The Government of Georgia is the supreme body of executive power that implements the domestic and foreign policies of the country.”⁷ Neither the provision mentioned nor any other in the Constitution grants the Government of Georgia the authority to engage in law-making activities at the constitutional level. However, whereas most constitutions designate lawmaking as the formal responsibility of legislators with the executive tasked to execute, parliamentary systems witness the legislature actualizing the legislative intentions of the executive. Notably, the government holds a distinctive right of legislative initiative.⁸

According to the Constitution of Georgia, the Government of Georgia possesses the right of legislative initiative⁹ and has the privilege of requesting an extraordinary review of draft laws submitted to the Parliament.¹⁰ At the same time, in addition to its legislative initiative, the Constitution of Georgia delineates the Government’s distinct competence concerning the State Budget Law. Specifically, the Parliament of Georgia shall annually adopt the Law on the State Budget by a majority of the total number of its members.¹¹ Furthermore, only the Government of Georgia shall have the right to present a draft State Budget to Parliament after the Basic Data and Directions have been examined with the committees of Parliament.¹² Amending a draft law on the State Budget shall be inadmissible without the consent of the Government.¹³ Parliament may adopt a law on increasing the expenditures or on reducing the revenues of a State Budget, or on introducing new financial obligations for the State for the current budget year, only with the consent of the Government. Laws related to the following budget year may be adopted with the consent of the Government or within the scope of the document on Basic Data and Directions of the country submitted by the Government to Parliament.¹⁴

⁶ *ibid*, Article 36, paragraph 1.

⁷ *ibid*, Article 54, paragraph 1.

⁸ Andras Sajó, *Limiting Government: An Introduction to Constitutionalism* (scientific edition and foreword by Tevdore Ninidze, 2003) 196 (in Georgian).

⁹ Article 45, paragraph 1, Constitution of Georgia <<https://www.matsne.gov.ge/ka/document/view/30346?publication=36>> [last accessed on 10 February 2023].

¹⁰ *ibid*.

¹¹ *ibid*, Article 66.

¹² *ibid*, Article 66, paragraph 2.

¹³ *ibid*, Article 66, paragraph 3.

¹⁴ *ibid*, Article 66, paragraph 4.

The remarks of the President on the Law on the State Budget may be accepted by Parliament only with the consent of the Government.¹⁵ In addition, according to the Constitution of Georgia, the Constitutional Court of Georgia shall in accordance with the procedures established by the organic law, make decisions on the constitutionality of a normative act on the basis of a claim submitted by the Government.¹⁶ Thus, the government possesses the authority to initiate constitutional control and, from this perspective, has the capacity to influence law-making activity.

Therefore, the government of Georgia, at the constitutional level, lacks mandate to adopt laws; Rather, it holds the competence to initiate legislation. Simultaneously, it possesses special powers concerning the state budget law and is equipped with the authority to request the recognition of acts passed by the Parliament as unconstitutional.

III. DELEGATION OF LAW-MAKING COMPETENCE AND ITS PRACTICAL NEED

Despite the crucial role of the legislative branch of law-making activities, the executive authority in modern states often receives explicit authority or obligation from the legislature to regulate certain issues. Consequently, a significant portion of legal norms are adopted by the executive branch of the government.¹⁷ It should be noted that the constitutions of certain countries specify the eligibility of delegation and describe its scope in detail (for example, Germany,¹⁸ France¹⁹). The constitutions of several countries do not include a reservation regarding the admissibility of the delegation of legislative competence, and relevant constitutional standards are derived from court practice (for example, Australia,²⁰ USA²¹). Georgia also falls into the latter category, where the admissibility of delegating the competence to draft norms by the Parliament and its scope are determined by the Constitutional Court.

The legislator's delegation of issues to be regulated by law to the executive authority is justified by several arguments, among which is the promotion of the effective implementation of fundamental legislative activities.²² Legislative authority encompasses

¹⁵ *ibid*, Article 66, paragraph 7.

¹⁶ *ibid*, Article 60, paragraph 4, subparagraph "b".

¹⁷ András Sajó and Renáta Uitz, *supra* note 1, 60.

¹⁸ Article 80, Basic Law for the Federal Republic of Germany (GG) <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf> [last accessed on 15 August 2023].

¹⁹ Article 38, Constitution of the French Republic <https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf> [last accessed on 8 August 2023].

²⁰ *Baxter v. Ah Way* 8 CLR 626, 637-638 (1910) <<https://jade.io/article/61932?at.p=index>> [last accessed on 15 July 2023]; *Roche v. Kronheimer* 29 CLR 329 (1921) <<https://jade.io/article/62937>> [last accessed on 15 July 2023].

²¹ *J.W. Hampton, Jr & Co v. U.S.* 276 US. 394, 406 (1928) <<https://supreme.justia.com/cases/federal/us/276/394/>> [last accessed on 15 July 2023].

²² European Commission for Democracy through Law (Venice Commission), 'The Quality of Law'

making decisions on various aspects of public life across all areas of the country's development and normative regulation of relevant legal relations. Consequently, legislative activity, involving the transfer of various aspects of public relations to the normative space and their regulation, is an ongoing process that demands considerable time, effort, and human/material resources.²³ It is nearly impossible for the legislature to enact all the detailed rules through general laws, and the ordinary legislative process, with its debates and votes, may not be suitable for this purpose.²⁴ Accordingly, the legislative body's attempt to regulate all issues related to the limitation of rights may result in its paralysis or disruption.²⁵

Even if the parliament could regulate all the details its own, it would lack the ability to continuously adapt the laws during their enforcement.²⁶ In a developing society, there is an ongoing necessity to adapt, modify, and customize regulations in various spheres of public life to accommodate new realities and values.²⁷ Thus, in addition to protecting the legislature from overloading, the delegation of authority enables straightforward statutory changes in areas that require frequent modification. This, in turn, allows for adapting regulation to changing circumstances through simplified procedures.²⁸

At the same time, legislation becomes an ineffective tool if it can only regulate issues existing at the time of law adoption. The purpose of legislation is to govern future relations, addressing any issues that may arise in the application of the law. However, given the diversity of legal relations, it is impossible to foresee and regulate all issues in advance. Hence, legislation often leaves room for authorized persons to determine the circumstances under which the law is applicable.²⁹

At the same time, the delegation of regulatory authority is also justified by the need of expeditious decision-making on various issues.³⁰ Frequently, urgent action is required, and the government cannot afford to wait for the legislature to convene.³¹

(CDL-UDT(2010)020, 2010), paragraph 8 <[https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-UDT\(2010\)020-e](https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-UDT(2010)020-e)> [last accessed on 15 January 2023].

²³ Decision of the Constitutional Court of Georgia on case №1/1/1505,1515,1516,1529 "Paata Diasamidze, Giorgi Chitidze, Eduard Marikashvili and Lika Sajaia v. the Parliament of Georgia and the Government of Georgia", 11 February 2021. II-37.

²⁴ European Commission for Democracy through Law (Venice Commission), 'The Quality of Law' (CDL-UDT(2010)020, 2010), paragraph 8 <[https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-UDT\(2010\)020-e](https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-UDT(2010)020-e)> [last accessed on 15 January 2023].

²⁵ Decision of the Constitutional Court of Georgia on case №1/7/1275 "Aleksandre Mdzinarashvili v. the National Communications Commission of Georgia", 2 August 2019. II-30.

²⁶ András Sajó and Renáta Uitz, *supra* note 1, 261.

²⁷ Decision of the Constitutional Court of Georgia on case №1/5/1499 "Mikheil Samnidze v. the Government of Georgia", 16 December 2021. II-13.

²⁸ Decision of the Constitutional Court of Georgia on case №1/7/1275 "Aleksandre Mdzinarashvili v. the National Communications Commission of Georgia", 2 August 2019. II-31.

²⁹ *Baxter v Ah Way* 8 CLR 626, 637-638 (1909) <[https://jade.io/article/61922?at.hl=Baxter+v+Ah+Way+\(1909\)](https://jade.io/article/61922?at.hl=Baxter+v+Ah+Way+(1909))> [last accessed on 15 January 2023].

³⁰ Decision of the Constitutional Court of Georgia on case №1/7/1275 "Aleksandre Mdzinarashvili v. the National Communications Commission of Georgia", 2 August 2019. II-31.

³¹ European Commission for Democracy through Law (Venice Commission), 'The Quality of Law' (CDL-UDT(2010)020, 2010), paragraph 8 <[https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-UDT\(2010\)020-e](https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-UDT(2010)020-e)> [last accessed on 15 January 2023].

Moreover, it is considered preferable, from the perspective of legislative technique, to separate the most important general rules from detailed issues. Certain matters may be too technical to settle at a legislative level (e.g. building regulations). Furthermore, some issues, such as expediency limits, are better regulated at the regional or local level than at the national level, as local authorities may have a better understanding of the needs of local legislation.³²

Thus, the delegation of legislative competence is an essential tool in the legislative process. It arises from practical needs and serves the purposes of effective governance.

IV. ARGUMENTS AGAINST THE DELEGATION OF LAW-MAKING COMPETENCE

Despite the practical importance of delegating of law-making competence, various arguments have been raised against the use of this mechanism. Simultaneously, considering the potential dangers associated with delegating this function, courts in different countries have adopted a diverse approach regarding the permissibility of this instrument and its constitutional scope. The present chapter is dedicated to the analysis of these risks.

1. THE PRINCIPLE OF SEPARATION OF POWERS

In order to safeguard against the usurpation and abuse of power, and thereby prevent the infringement of fundamental human rights and freedoms, countries adopt an institutional architecture where the authority is distributed among different branches. As *James Madison* highlighted in the letters of the Federalist, there are two most reliable means which would have kept us from the gradual concentration of all power in one department. On the one hand, it is necessary to grant proper constitutional authority to those who manage this or that department; on the other hand, it is necessary that they have personal reasons to resist the attempts of members of other departments to encroach on their powers.”³³ According to *Charles Louis de Montesquieu*: it has always been the case that a man in power tend to abuse it, and this tendency persists until they encounter a barrier. To prevent the abuse of power, structures should be organized in

[aspx?pdffile=CDL-UDT\(2010\)020-e](#)> [last accessed on 15 January 2023].

³² *ibid.*

³³ The Federalist Papers, No. 51: Madison (New York: Mentor Books, 1961) 322 <https://files.libertyfund.org/files/788/0084_LFeBk.pdf> [last accessed on 14 August 2023].

a manner where power is used to control power.³⁴ The craving for power can only be curbed when the individual harbouring this desire is not the one in control of the means necessary to achieve it.³⁵

Thus, “the principle of the separation of powers aims to mitigate the risks of concentration and misuse of state power. Under such institutionalization of state power, it becomes possible to deter usurpers of official power and safeguard the supreme and immutable constitutional value - human rights and freedoms”.³⁶ The branches of government should mutually support each other, even though they have to evolve independently. Failing to do so might provide an opportunity for unilateral creation and enforcement of regulations, leading to the potential for tyranny.³⁷ In light of these risks, some countries opt not to delegate legislative competence.³⁸

It is considered that the division of power between the branches of government prevents the consolidation of powers not only through encroachment by one branch on the competence of another but also in the case of voluntary surrender of power.³⁹ Building on the aforementioned points, the argument against delegating law-making competence is connected to upholding the principle of separation of powers.

2. POPULAR SOVEREIGNTY AND REPRESENTATIVE DEMOCRACY

John Locke argued against the delegation of legislative power, stating that the legislature shall not delegate the power of making law to others. According to him, when individuals agree to be governed by laws, it implies that these laws should be issued by those chosen

³⁴ Anne M. Cohler and others (eds), Charles Secondat and Baron de Montesquieu, *The Spirit of the Laws* (Cambridge University Press 1992) 4.

³⁵ Sajo, *supra* note 8, 90.

³⁶ Decision of the Constitutional Court of Georgia on the case №3/4/641 “Constitutional Submission of Kutaisi Court of Appeal on the Constitutionality of Article 19(3) of the Law of the Autonomous Republic of Adjara on the Management and Disposal of Property of the Autonomous Republic of Adjara”, 29 September 2016. II-2.

³⁷ European Commission for Democracy through Law (Venice Commission), ‘The Quality of Law’ (CDL-UDT(2010)020, 2010), paragraph 1 <[https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-UDT\(2010\)020-e](https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-UDT(2010)020-e)> [last accessed on 15 January 2023].

³⁸ For example, the Constitutional Court of the Republic of Lithuania indicates in a number of decisions that in Lithuania, based on the principle of separation of powers, there is no mandate to delegate the authority to adopt a law. See Constitutional Court’s Rulings of 26 October 1995, 19 December 1996, 3 June 1999, and 5 March 2004 <<https://lrkt.lt/data/public/uploads/2021/06/selected-official-constitutional-doctrine-19932020.pdf>> [last accessed on 15 January 2023]; Constitutional Court’s Rulings of 26 October 1995, 19 December 1996, and 3 June 1999 <<https://lrkt.lt/data/public/uploads/2021/06/selected-official-constitutional-doctrine-19932020.pdf>> [last accessed on 15 January 2023].

³⁹ Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State* (George Mason University Legal Studies Research Paper Series 2017) 149.

in a specific constitutional form, and the authority to make laws should not be handed over to others.⁴⁰ *Locke* posited, based on the principle of popular sovereignty, that the authority to draft laws is inherently a delegated power from the people. This delegated authority cannot be further transferred without the explicit consent of the people.⁴¹

Legislation, functioning as a mechanism to balance competing interests and values, is inherently obligatory. It constitutes a significant intervention in human freedom, as it compels the recipient of the norm to adhere to a rule of conduct that may not align with their agreement or interests. In a democratic society, such restrictions on human rights are legitimized by the elective nature of the decision-making body. Thus, the execution of law-making activities is the responsibility of a body empowered to represent the people, possessing public-democratic legitimacy from this perspective. “The delegation of legislative power to an elected [people’s representative] body is a fundamental aspect of democracy, as it enables citizens, albeit indirectly, to participate in the creation their own laws.”⁴² These arguments constitute the foundation for the principle of the inadmissibility of delegation of delegated authority (*Delegata potestas non potest delegari*).

The Constitutional Court of Georgia also affirms the significance of the mentioned principle. According to the Constitutional Court’s definition, “Democracy, in the immediate sense, implies the rule of the people, therefore, it encompasses the right of citizens to participate in both the formation and implementation of the government. ... Democracy is primarily manifested through the realization of popular sovereignty, as people’s participation in the implementation of government is the fundamental essence, basis, and goal of democracy“.⁴³ “The concept of popular sovereignty suggests that every citizen contributes to the establishment of the government and, consequently, engages in the exercise of power. Popular sovereignty is predominantly realized through the principle of representative democracy. Each citizen of Georgia selects a representative to whom they delegate their authority, thereby endowing them with the legitimacy to make crucial decisions and govern the state.”⁴⁴ The essence of democracy extends beyond the mere act of electing representatives through the exercise of the right to vote. Its ongoing outcome is the execution of the governing function by the elected representatives, inherently encompassing the performance of the legislative function.⁴⁵

⁴⁰ David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People through Delegation* (Yale University Press 1993) 155, 156.

⁴¹ John Locke, *Second Treatise on Government* (1689) in Peter Laslett (ed), *Two Treatises of Government: John Locke* (Cambridge University Press 1988) 362-363.

⁴² Sajo, *supra* note 8, 191.

⁴³ Decision of the Constitutional Court of Georgia on case №3/3/574 “Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia”, 23 May 2014. II-9.

⁴⁴ Decision of the Constitutional Court of Georgia on case №1/3/547 “Citizens of Georgia Ucha Nanuashvili and Mikheil Sharashidze v. the Parliament of Georgia”, 22 May 2015. II-3.

⁴⁵ The dissenting opinion of the judge of the Constitutional Court of Georgia - Giorgi Kverenchkhiladze regarding Decision №1/1/1505,1515,1516,1529 of the Constitutional Court of Georgia, 11 February 2021. Paragraph 5.

Based on the above, the argument against the delegation of law-making activity may also be grounded in the primacy of popular sovereignty and the principle of safeguarding representative democracy.

3. LESS TRANSPARENT DECISION-MAKING PROCESS

Another argument against the delegation of legislative competence to the executive authority arises from the procedural differences in adopting a normative act. The executive's adoption process is characterized by less transparency and accountability compared to the complex parliamentary procedures employed by the legislative body. The latter involves transparent decision-making, the balancing of interests, and the participation of both political majorities and minorities. Adopting an act through such a procedure allows all interested parties to contribute to the formation of political will, mitigating the risk of arbitrary actions by the majority. This approach significantly reduces the potential for the arbitrary use of power and enhances the legitimacy and credibility of the adopted act.⁴⁶

In contrast to the aforementioned, the act is adopted by the executive authority (government, ministry) under conditions of limited transparency and accountability, thereby heightening the risk of unilateral, arbitrary decisions and potentially excessive restrictions on basic rights and freedoms. It is often presumed that the executive power is more susceptible to violate human rights.⁴⁷ Different branches of government operate on distinct principles. The executive branch is not structured, and, in fact, cannot be organized based on the principle of decision-making by a majority vote, as extensive discussions may compromise the effectiveness of governance.⁴⁸ As a consequence, the government, particularly the ministry, tends to adopt acts with fewer discussions, debates, and the exchange of opinions, as well as less confrontation of ideas. This dynamic results in fewer filters to prevent unjustified interference with rights and fewer procedural safeguards that could otherwise reduce the likelihood of unilateral decisions through a non-transparent procedure.

If legislation fails to emerge from broad public consensus, it is less likely to possess the potential to safeguard minority interests. Therefore, one of the arguments against the delegation of legislative competence stems from a less transparent decision-making procedure.

⁴⁶ Decision of the Constitutional Court of Georgia on case №1/7/1275 “Aleksandre Mdzinarashvili v. the National Communications Commission of Georgia”, 2 August 2019. II-28.

⁴⁷ Sajo, *supra* note 8, 192.

⁴⁸ *ibid*, 214.

V. PERMISSIBLE SCOPE OF DELEGATION OF LEGISLATIVE ACTIVITY

The practical necessity of delegating legislative competence often prevails over arguments against it, leading the executive to become a participant in the rule-making process. However, there is a challenge in determining the permissible scope of the delegated authority. Entrusted uncontrolled law-making to the executive power contradicts the principles of democracy.⁴⁹ While there is an opportunity to assess acts adopted within the framework of delegated authority, it is fundamentally flawed for a body lacking proper legislative competence to make a decision on specific issues.⁵⁰ Hence, it is crucial to establish the bounds within which the legislative body is authorized to delegate the regulation of a particular issue to another body.

1. ISSUES, REGULATION OF WHICH CANNOT BE DELEGATED

The Constitutional Court of Georgia, like the courts of other countries, essentially establishes similar criteria when delineating the scope of issues that cannot be delegated. Specifically, the Constitutional Court deems the delegation of a fundamentally important part of its powers by the Parliament of Georgia as unconstitutional.⁵¹ According to the interpretation of the Constitutional Court, the direct mandate given by the people to the members of the Parliament of Georgia implies that they should make decisions concerning the fundamental principles and the essential aspects of the social, economic, cultural, legal and political development of the country, following the procedures defined by the Constitution. They are expected to deliberate on issues that are of high political and public interest and whose regulation holds significant importance.⁵² They are tasked with determining the approaches to resolving issues that impact the country's long-term development prospects and/or entail significant restrictions on the fundamental rights of individuals.⁵³

Similar to Georgia, the German Constitutional Court stipulates that the legislator must personally make all “substantial” decisions.⁵⁴ When assessing the substance of the issue,

⁴⁹ *ibid*, 206.

⁵⁰ Decision of the Constitutional Court of Georgia on case №1/7/1275 “Aleksandre Mdzinarashvili v. the National Communications Commission of Georgia”, 2 August 2019. II-39.

⁵¹ The decision of the Constitutional Court of Georgia on case №3/3/763 “Group of members of the Parliament of Georgia (Davit Bakradze, Sergo Ratiani, Roland Akhalia, Giorgi Baramidze et al., a total of 42 members of the Parliament) v. the Parliament of Georgia”, 20 July 2016. II-78.

⁵² Decision of the Constitutional Court of Georgia on case №2/5/700 “Coca-Cola Bottlers Georgia LLC”, “Castel Georgia LLC” and JSC “Tskali Margebeli” v. the Parliament of Georgia and the Minister of Finance of Georgia”, 26 July 2018. II-17.

⁵³ Decision of the Constitutional Court of Georgia on case №1/5/1499 “Mikheil Samidze v. the Government of Georgia”, 16 December 2021. II-18.

⁵⁴ Kalkar I case, BVerfGE 49, 89 (1978) <<https://www.bundesverfassungsgericht.de/EN/Entscheidungen>

consideration is given to general constitutional regulations, particularly basic rights⁵⁵ and the principle of democracy.⁵⁶ According to the US Supreme Court, Congress cannot delegate power that is “strictly and exclusively legislative.”⁵⁷ The legislature must establish a foundation for legitimate administrative action and cannot evade making fundamental decisions for society.⁵⁸

The Constitutional Court of Georgia declared the contested norm as unconstitutional only in one instance, citing the significance of the delegated issue. Specifically, the matter pertained to the delegation of content regulation of the freedom of expression, as established by the Constitution of Georgia, to the National Communications Commission of Georgia. Stressing the paramount importance of freedom of expression, the Constitutional Court of Georgia underscored the prohibition of assigning the content regulation of this right to another body.⁵⁹

In addition to the prohibition of delegating issues of fundamental importance, the Constitutional Court of Georgia deems it unconstitutional to confer such authority to another government body, the delegation of which is expressly prohibited by the Constitution of Georgia.⁶⁰ The court’s explanation asserts that the delegation of the

[/40ff/FAQ-Liste.html](#)] [last accessed on 15 July 2023], see English translation Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd Edition, Dike University Press 2012) 177, 178; BVerfGE 33, 303, 303 (1972) <https://www.bundesverfassungsgericht.de/DE/Entscheidungen/Liste/30ff/liste_node.html> [last accessed on 15 July 2023]; BVerfGE 47, 46, 78-79 (1977) <https://www.bundesverfassungsgericht.de/DE/Entscheidungen/Liste/40ff/liste_node.html> [last accessed on 15 July 2023]; BVerfGE 49, 89, 126 (1978) <<https://www.bundesverfassungsgericht.de/EN/Entscheidungen/40ff/FAQ-Liste.html>> [last accessed on 15 July 2023].

⁵⁵ BVertUE 50, 257, 274 (1981) <https://www.bundesverfassungsgericht.de/DE/Entscheidungen/Liste/50ff/liste_node.html> [last accessed on 15 July 2023]; BVerfGE 49, 89, 127 (1978) <<https://www.bundesverfassungsgericht.de/EN/Entscheidungen/40ff/FAQ-Liste.html>> [last accessed on 15 July 2023].

⁵⁶ Hartmut Maurer, *Allgemeines Verwaltungsrecht* (18 Auflage, Beck 2011) section 6, arginal number 14; Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd Edition, Dike University Press 2012) 176; Sven Hölscheidt, ‘The principle of lawful management’ (2001) *Juristische Arbeitsblätter* 409 (412).

⁵⁷ *Wayman v. Southard*, 23 U.S. 42-43 (1825) <<https://supreme.justia.com/cases/federal/us/23/1/>> [last accessed on 15 July 2023].

⁵⁸ Stefan Huster and Johannes Rux, ‘Kommentierung des Art. 20a GG’ in Volker Epping and Christian Hillgruber (eds), *Beck’scher Online-Kommentar Grundgesetz* (23 Auflage, Verlag C.H.BECK München 2014), Article 20, paragraph 173.

⁵⁹ Decision of the Constitutional Court of Georgia on case №1/7/1275 “Aleksandre Mdzinarashvili v. the National Communications Commission of Georgia”, 2 August 2019.

⁶⁰ For example, the Constitutional Court found it unconstitutional for the executive authority to determine the fee structure. According to the interpretation of the Constitutional Court, the indication of Article 67(1) of the Constitution that “only the law” shall determine the structure and the procedures for introducing taxes and fees, as well as their rates and the scope of those rates, excluded the possibility of delegating this issue. See Decision of the Constitutional Court of Georgia on the case №2/3/1279 “Levan Alafishvili and “Commandite company Alafishvili and Kavlashvili - Georgian Lawyers Group” v. the Government of Georgia”, 5 July 2019.

impeachment process and the election of certain officials by the Parliament of Georgia would also contravene the Constitution of Georgia.⁶¹ Moreover, according to the court's practice, issues that the Constitution of Georgia designates to be regulated by Organic law cannot be addressed based on regular legislation passed with a lower quorum.⁶²

2. THE NEED TO DETERMINE THE SCOPE OF AUTHORITY GRANTED IN THE DELEGATION OF LEGISLATIVE ACTIVITY

According to the definition provided by the Constitutional Court of Georgia, as well as the courts of other countries, it is imperative, before the delegation of legislative power, that the purpose, content, and scope⁶³ of the delegated authority be explicitly determined by the act granting the authority.⁶⁴

In the delegation of law-making competence, determining the legal scope of the granted authority is associated with the following considerations: the citizen must be able to predict how the delegated authority will be used and discern the interests and factors that should be taken into account when exercising the delegated authority.⁶⁵ At the same time, a “vague blanket rule” that grants the executive branch broad authority to define the limits of individual freedom contradicts the principle that administrative bodies should operate in accordance with the law. Moreover, establishing a clear framework of delegated authority is intricately tied to the principle of the separation of powers. If the law fails to adequately define the power of the executive, it risks the executive not implementing the law but substituting the decisions of the legislature. Furthermore, the mandate of the courts to ensure the protection of citizens' rights from government

⁶¹ Decision of the Constitutional Court of Georgia on case №2/5/700 “Coca-Cola Bottlers Georgia LLC”, “Castel Georgia LLC” and JSC “Tskali Margebeli” v. the Parliament of Georgia and the Minister of Finance of Georgia”, 26 July 2018. II-13.

⁶² Decision of the Constitutional Court of Georgia on case №2/5/658 “Georgian citizen Omar Jorbenadze v. the Parliament of Georgia”, 16 November 2017. II-26, 28.

⁶³ In the practice of the US Supreme Court, instead of determining the content, scope and purpose of the authority, the concept of the “intelligible principle” is used, within the framework of which the court checks whether the parliamentary act establishes adequate guidelines for the executive power to be guided based on it. See András Sajó and Renáta Uitz, *supra* note 1, 261.

⁶⁴ Decision of the Constitutional Court of Georgia on case №1/1/1505,1515,1516,1529 “Paata Diasamidze, Giorgi Chitidze, Eduard Marikashvili and Lika Sajaia v the Parliament of Georgia and the Government of Georgia”, 11 February 2021. II-42; See also: the decision of the Supreme Court of Israel on the case Rubinstein v Minister of Defense, H CJ 3267/97, 9 December 1998; Article 80, paragraph 1, Basic Law for the Federal Republic of Germany (GG) <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf> [last accessed on 15 August 2023]; Article 76, Constitution of the Italian Republic <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf> [last accessed on 8 August 2023].

⁶⁵ BVerfGE 1, 14, 60 (1951) <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1951/09/qs19510909_2bvq000151.html> [last accessed on 8 August 2023]; BVerfGE 15, 153, 160 (1962) < https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1983/12/rs19831215_1bvr020983en.html> [last accessed on 8 August 2023].

violations is fulfilled only if the courts can scrutinize the implementation of the norm by the executive branch. Hence, the scope of the powers granted must be appropriately delineated in the law.⁶⁶

According to the practice of the Constitutional Court of Georgia, “determining the purpose, content and scope of the delegated authority is crucial, as it is with these criteria that the legality of the acts adopted by the executive authority and its actions should be examined. Ultimately, this assessment gauges the extent to which the Parliament of Georgia adhered to the given mandate. The judiciary should possess the ability to evaluate the actions of the Georgian government based on the criteria established by the legislator. Hence, the purpose, content, and scope of the delegation of authority should be clearly, unambiguously, and comprehensibly defined”.⁶⁷

It should be noted that although the Constitutional Court of Georgia has been assessing the constitutionality of the delegation of legislative competence for a considerable period, the standard requiring the determination of objectives, content, and permissible scope before delegation was established only by the decision made on February 11, 2021.⁶⁸ The constitutionality verification of the authority delegated under this standard occurred in a total of 2 decisions.⁶⁹ Before that, the Constitutional Court did not apply this standard when assessing the constitutionality of the delegation of rule-making functions.⁷⁰

VI. PROBLEMATIC ISSUES RELATED TO DELEGATION OF LEGISLATIVE ACTIVITY

After examining the overarching standards for the delegation of legislative activity, it is crucial to delineate the challenges associated with delegating law-making competence and explore potential solutions. This chapter delves into the practical intricacies of applying general delegation standards to individual cases, highlighting key factors that demand consideration in the delegation process.

⁶⁶ Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd Edition, Dike University Press 2012) 176.

⁶⁷ Decision of the Constitutional Court of Georgia on case №1/1/1505,1515,1516,1529 “Paata Diasamidze, Giorgi Chitidze, Eduard Marikashvili and Lika Sajaia v. the Parliament of Georgia and the Government of Georgia”, 11 February 2021. II-51.

⁶⁸ *ibid.*

⁶⁹ *ibid.*; See also: Decision of the Constitutional Court of Georgia on case №1/5/1499 “Mikheil Samnidze v. the Government of Georgia”, 16 December 2021.

⁷⁰ For example, the decision of the Constitutional Court of Georgia on case №3/3/763 “Group of members of the Parliament of Georgia (Davit Bakradze, Sergo Ratiani, Roland Akhalia, Giorgi Baramidze et al. a total of 42 members of the Parliament) v the Parliament of Georgia”, 20 July 2016; Decision of the Constitutional Court of Georgia on case №2/5/700 “Coca-Cola Bottlers Georgia LLC”, “Castel Georgia LLC” and JSC “Tskali Margebeli” v the Parliament of Georgia and the Minister of Finance of Georgia”, 26 July 2018.

1. DIFFICULTY DETERMINING THE SCOPE OF PERMISSIBLE DELEGATION

As previously mentioned, for the delegation of legislative activities to align with constitutional principles, the parliament must refrain from delegating the authority to regulate fundamental, essential issues to another body. In cases where the authority to regulate non-essential issues is delegated, the guiding criteria must be sufficiently determined, providing a clear framework to which the executive branch of the government will be bound in the process of rule-making. Although this standard is essentially formulated in the practice of different countries, its general nature poses challenges when adapting it to specific cases.⁷¹ Thus, establishing the exact boundaries of the delegation of discretionary power to another branch is a complex subject of inquiry⁷² and not easily enforceable by the courts.⁷³

For example, in one of the cases, the German Constitutional Court drew a distinction between the matters of a student repeating a class and expulsion of a student.⁷⁴ The court noted that the expulsion of a student was linked to significant rights, impacting their future life and employment prospects. Therefore, it was deemed an essential issue for constitutional purposes and should be regulated by the Parliament.⁷⁵ Conversely, retaking the class did not significantly impact the student's rights; it merely extended their education by one year, making the matter suitable for delegation.⁷⁶ Consequently, the demarcation between essential and non-essential issues is delicate.

The constitutional standard regarding the obligation to specify the purpose, scope and content of the delegated authority when delegating the resolution of non-essential issues is of a general nature. According to the practice of the Constitutional Court of Georgia, “determining the purpose, scope, and content of delegation does not imply the degree of concretization that is characteristic of directly right-limiting regulation. If the legislator is required to provide detailed forms and types of any restrictions on the right in the delegating act and to define their clear content, the delegation of authority itself would, in fact, lose its meaning both in terms of relieving the legislator from the regulation of technical-procedural issues and in terms of making decisions based

⁷¹ Decision of the Constitutional Court of Georgia on case №1/5/1499 “Mikheil Samnidze v. the Government of Georgia”, 16 December 2021. II-18.

⁷² *Wayman v. Southard*, 23 U.S. 46 (1825) <<https://supreme.justia.com/cases/federal/us/23/1/>> [last accessed on 15 July 2023].

⁷³ *Mistretta v. United States*, 488 U.S. 361, 415 (Justice Scalia dissenting) (1989) <<https://supreme.justia.com/cases/federal/us/488/361/>> [last accessed on 15 July 2023].

⁷⁴ BVerfGE 58, 257, 257, 268-276 (1981) <https://www.bundesverfassungsgericht.de/DE/Entscheidungen/Liste/50ff/liste_node.html> [last accessed on 15 July 2023].

⁷⁵ *ibid*, 273, 275.

⁷⁶ *ibid*, 273-76.

on specialized knowledge/experience and within a shorter time frame.”⁷⁷ Similar to the practice of the Constitutional Court of Georgia, in the judicial practice of other countries, the adequacy of the legal framework for restricting rights is assessed on a case-by-case basis. The precision of the guidelines is intricately linked to the nature of the issue to be regulated and the intensity of the regulation.⁷⁸ In particular, the need for precision is less pronounced when delegating smaller, less significant powers compared to the delegation of powers that could potentially encroach upon a broad spectrum of fundamental rights or impose substantial burdens on businesses.⁷⁹

In terms of tailoring the aforementioned standard to a specific case, Decision No. 1/1/1505,1515,1516,1529 adopted by the court on February 11, 2021, stands out as a significant milestone in the practice of the Constitutional Court of Georgia.⁸⁰ In the contested norms of the mentioned case, the government of Georgia or the Minister designated by the government was granted the authority to introduce regulations restricting the freedom of movement, property and the right of assembly to protect public health during the pandemic. Simultaneously, the legislation stipulated that the restriction of the right by the executive authority should aim to achieve the benefits protected by the relevant article of the Constitution of Georgia, be necessary for a democratic society, non-discriminatory and proportionally restrictive. The Constitutional Court deemed that the delegation of authority to limit the right in such a manner met the standard for determining the content, scope, and purpose of the delegated authority.

Regarding the nature of the issue at hand, the court highlighted that the delegation outlined in the contested norms was of a temporary nature. Furthermore, under the delegated authority, the Government of Georgia was specifically empowered to introduce rules aimed at safeguarding public health during a pandemic or an epidemic particularly dangerous for society. According to the court’s stance, these measures were not anticipated to exert a significant impact on the long-term prospects of the country’s social, economic, cultural, legal, or political development. At the same time, the exercise of the delegated authority as per the contested norms did not entail such a

⁷⁷ Decision of the Constitutional Court of Georgia on case №1/1/1505,1515,1516,1529 “Paata Diasamidze, Giorgi Chitidze, Eduard Marikashvili and Lika Sajaia v the Parliament of Georgia and the Government of Georgia”, 11 February 2021. II-46.

⁷⁸ Am. Trucking, 531 U.S. 475 (2001) (majority opinion) <<https://supreme.justia.com/cases/federal/us/531/457/>> [last accessed on 15 July 2023]; Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd Edition, Dike University Press 2012) 180; Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State* (George Mason University Legal Studies Research Paper Series 2017) 172.

⁷⁹ Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State* (George Mason University Legal Studies Research Paper Series 2017) 172.

⁸⁰ Decision of the Constitutional Court of Georgia on case №1/1/1505,1515,1516,1529 “Paata Diasamidze, Giorgi Chitidze, Eduard Marikashvili and Lika Sajaia v the Parliament of Georgia and the Government of Georgia”, 11 February 2021.

substantial infringement on human freedom, either in its nature or intensity, that would unequivocally necessitate the decision on its permissibility to be exclusively determined by the legislative body.⁸¹

It is noteworthy, that the disputed regulation essentially outlined the purpose of the delegated authority, specifying that regulations restricting the right to freedom of movement, property, and assembly by the executive power could only be adopted for the purpose of protecting public health. Apart from this declaration, the Government of Georgia or the relevant Ministry was not bound by any reservations. Additionally, they were granted the authority to introduce regulations differing from existing normative acts. The scope of action of the executive authority was not constrained by the legislator's reference to the obligation to observe the principles of proportionality and non-discrimination. These principles, in and of themselves, constitute the constitutional standard for any regulation limiting rights, and their inclusion in the law did not provide an extra guarantee of right-protection, let alone specify the extent of the delegated authority.

Therefore, in the absence of a clear framework during the delegation of the authority to introduce restrictive regulations, the executive branch was authorized to implement any measures limiting the rights to freedom of movement, property, and assembly for the purpose of safeguarding public health. Simultaneously, the fact that this authority was linked to the pandemic and of a temporary nature did not negate the essence of the matter at hand. The power to regulate a specific issue, whether for a short or indefinite period, cannot alter the substance of the matter or diminish its fundamental nature.⁸² The resolution of fundamental issues remains a perpetual and unalterable responsibility of the legislative body, even if temporarily delegated to another entity, contrary to the general standard set by the Constitutional Court regarding the delegation of legislative competence. The contested norms conferred authority not only to the government but also to a specific ministry, allowing the limitation of constitutional rights and the establishment of regulations distinct from normative acts. This case undeniably manifested the genuine risks associated with broad delegation of legislative activity.

At the same time, it is important to highlight that the contested regulation was enacted amid the outbreak of the pandemic, specifically the new coronavirus (COVID-19), in the country. Although no official state of emergency was declared, the state authorities were unable to exercise their constitutional powers in a normal manner, signifying the presence of a "de facto" state of emergency. During a state of emergency, the Constitution itself allows for the transfer of right-limiting regulations to other branches of government,

⁸¹ *ibid.*

⁸² The dissenting opinion of the judge of the Constitutional Court of Georgia - Giorgi Kverenchkhiladze regarding the decision of the first chamber of the Constitutional Court of Georgia №1/1/1505,1515,1516,1529, 11 February 2021. Paragraph 21.

following the appropriate constitutional procedure.⁸³ Hence, the state of emergency provides a rationale for restricting certain constitutional rights by circumventing the regular rules of delegation. However, in this decision, the Constitutional Court appraised the delegation of legislative activity in its prevailing form, deeming it constitutional - not as an exceptional circumstance, but advocating this approach as a general standard for evaluating the delegation of law-making activities. Applying this standard to assess the delegation of authority poses a substantial threat to the principles of separation of powers and democracy.

2. SEPARATION OF LEGISLATIVE AND EXECUTIVE ACTIVITIES

The Constitutional Court of Georgia's stance on the delegation of legislative activity leaves several fundamental questions unanswered, aligning with diverse positions found in the decisions of other countries' courts and legal doctrine. Among these issues, a crucial aspect is the clarification of the term "legislative activity." Notably, in the Constitutional Court's practice, there is an absence of analysis on whether any restrictive decision articulated in a normative rule constitutes legislative activity. It remains unclear whether the executive function, by its nature, necessitates, in certain instances, the promulgation of normative rules, thereby not constituting the exercise of legislative function but rather the implementation and enforcement of the law.

Additionally, it is noteworthy that the norms enshrining the fundamental rights affirmed by the Constitution of Georgia, in certain instances, *expressis verbis* state the obligation⁸⁴ to limit these rights based on the law, while several provisions lack such a reservation.⁸⁵ The constitutional standards for the delegation of legislative activity, as per the Constitutional Court's practice, are applicable only in instances where a fundamental right, confirmed by the Constitution, imposes the obligation to limit it based on the law. The Constitutional Court refers to this provision, emphasizing that in such cases, the Constitution mandates the limitation of the right through legal means. Following this rationale, the court assesses the extent to which the executive branch's restriction of the right aligns with the Constitution. Consequently, the Court has not yet established the standards of delegation for other rights that the Constitution does not explicitly require to be limited by law. It is noteworthy that the court will need to address this question in the ongoing case.⁸⁶

⁸³ Article 71, Constitution of Georgia <<https://www.matsne.gov.ge/ka/document/view/30346?publication=36>> [last accessed on 10 February 2023].

⁸⁴ For example, freedom of movement reinforced by Article 14 of the Constitution of Georgia, rights to personal and family privacy, personal space and privacy of communication protected by Article 15, right to property protected by Article 19, etc.

⁸⁵ For example, right to free personal development protected by Article 12 of the Constitution, right to fair administrative proceedings reinforced by Article 18, procedural rights guaranteed by Article 31, etc.

⁸⁶ Constitutional Complaint №1502 "Zaur Shermazanashvili v. the President of Georgia and the

The separation of legislative activity and administrative rule-making powers by the executive branch is a widely discussed issue in the practice of the US Supreme Court. In the case of *Field v. Clark*, the US Supreme Court made a distinction between fact-finding authority and legislative exercise. Specifically, according to the court's clarification, when Congress prescribes an action to be taken in the presence of a specific fact, and the President is authorized to ascertain this fact and subsequently carry out the action prescribed by Congress, it constitutes an executive action, not a legislative one.⁸⁷ The decision was unrelated to the policy discretion inherent in legislation.⁸⁸ Instead, the court scrutinized whether it constituted an exercise of general policy discretion (legislative prerogative) or involved fact-finding and implementation (executive function).⁸⁹ In the case *J. W. Hampton, Jr. & Co. v. United States*, the Court emphasized that Congress had unequivocally defined its tariff plan and policy. The President, in this context, possessed discretion solely in the implementation of the plan and did not formulate the plan independently.⁹⁰ Hence, it was concluded that there was no delegation of legislative power.⁹¹

Thus, there is an opinion suggesting that the executive body, tasked with enforcing legislation, must frequently establish rules to fulfill its duty. This responsibility is inherent to this branch of government and is not intricately linked to the delegation of legislative activity.⁹² As per the US Supreme Court, executive branch agencies engage in rule-making, a practice that has existed since the founding of the Republic. However, in accordance with the constitutional structure, this is deemed an exercise of executive

Government of Georgia”, 11 May 2020 <<https://constcourt.ge/ka/judicial-acts?legal=9169>> [last accessed on 16 May 2023]; Constitutional Complaint №1503 “Tornike Artkmeladze v. the President of Georgia, the Parliament of Georgia and the Government of Georgia”, 19 May 2020 <<https://constcourt.ge/ka/judicial-acts?legal=9191>> [last accessed on 16 May 2023].

⁸⁷ *Field v. Clark*, 143 U.S. 693 (1892) <<https://supreme.justia.com/cases/federal/us/143/649/>> [last accessed on 15 July 2023].

⁸⁸ *ibid*, 682-94.

⁸⁹ Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State* (George Mason University Legal Studies Research Paper Series 2017) 164.

⁹⁰ The issue concerned Congress's delegation of authority to impose customs duties on imports to the President, within which the President was authorized to impose a different (increased or reduced, up to 50%) customs duty than the fixed duty, in order to equalize the value of imported goods with national production.

⁹¹ *J.W. Hampton, Jr & Co v. U.S.* 276 US. 394, 406-10 (1928) <<https://supreme.justia.com/cases/federal/us/276/394/>> [last accessed on 15 July 2023].

⁹² For example, Kathryn A. Watts, ‘Rulemaking as Legislating’ (2015) 103 *Georgetown Law Journal* 1003, 1005 (“the Court holds ... that rule-making by administrative agencies must be an exercise of the “executive power” contained in Article II of the Constitution”); John F. Manning, ‘Separation of Powers as Ordinary Interpretation’ (2011) 124 *Harvard Law Review* 1939, 2020 (“It is no less accurate to say that when an agency implements an act by making rules pursuant to an intelligible principle, that agency is, in fact, enforcing the law.”); Edward Rubin, ‘The Myth of Accountability and the Anti-Administrative Impulse’ (2005) 103 *Michigan Law Review* 2073, 2094 (Implementation of the legislation “necessarily requires a certain amount of policy development”).

power.⁹³ In a different case, the Court explained that “a certain degree of discretion, and therefore lawmaking, is inherent in most executive or judicial actions.”⁹⁴

It is generally acknowledged that the authority to make political decisions is not inherently a legislative power; rather, it can fall within the purview of the executive or the judiciary if it aligns with the constitutional roles assigned to these branches.⁹⁵ Hence, while applying and implementing the law, the executive authority, at times, encounters the necessity to promulgate norms. However, such rule-making is considered part of the executive function and not within the purview of legislative authority.⁹⁶

3. DELEGATION OF DELEGATED AUTHORITY

Among other crucial issues concerning the permissibility of the delegation of legislative activity, the matter of allowing further delegation of the delegated authority is noteworthy. In the Georgian legal framework, neither the constitution nor any other legislative act includes a provision regarding the permissibility or prohibition of delegating this authority to another body by an entity with delegated authority when transferring law-making competence by the legislative authority. Simultaneously, the Constitutional Court of Georgia has not yet provided clarification on this matter.

From this point of view, the basic law of Germany is noteworthy, stipulating that, “... If the law provides that such authority may be further delegated, such subdelegation shall be effected by statutory instrument.”⁹⁷ Hence, the delegation of powers, initially delegated to the executive authority by the latter to another body is permissible only if the delegating act explicitly allows for such provision. Consequently, if the legislative body does not specify the possibility of further delegation of this competence during the initial delegation of authority, the matter should be regulated by the body empowered for such decisions by the Parliament.

Similarly to Germany, according to the practice of the US Supreme Court, the delegation of authority bestowed by the legislative body is prohibited unless the legislative body has clearly expressed its intent to permit such delegation.⁹⁸

As mentioned, the Constitutional Court of Georgia has not yet set constitutional

⁹³ *City of Arlington v. Federal Communications Commission* 569 U.S. 290, 304 n.4 (2013) <<https://supreme.justia.com/cases/federal/us/569/290/>> [last accessed on 15 July 2023].

⁹⁴ *Am. Trucking*, 531 U.S. 475 (2001) (majority opinion) <<https://supreme.justia.com/cases/federal/us/531/457/>> [last accessed on 15 July 2023].

⁹⁵ Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State* (George Mason University Legal Studies Research Paper Series 2017) 185.

⁹⁶ András Sajó and Renáta Uitz, *supra* note 1, 260.

⁹⁷ Article 80, Basic Law for the Federal Republic of Germany (GG) <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf> [last accessed on 15 August 2023].

⁹⁸ *United States v. Giordano*, 416 U.S. 505 (1974) <<https://supreme.justia.com/cases/federal/us/416/505/>> [last accessed on 15 July 2023].

standards concerning the aforementioned issue. Simultaneously, there is no explicit provision in the legislation outlining eligibility standards for the further delegation of delegated authority. Nevertheless, considering the discussed international standards, if the executive authority delegates authority without explicitly stating such a possibility sanctioned by the Parliament of Georgia, it is likely to contravene the national constitution.

VII. CONCLUSION

Amid the global pandemic of the new coronavirus (COVID-19), it became evident that in the absence of a clear definition of the constitutional limits of the delegation of law-making competence, even in a parliamentary republic, there are no constraints on the unchecked authority of the executive power. Simultaneously, there is no dispute that a broad delegation of law-making activities to the executive power jeopardizes the fundamental principles of the Constitution and heightens the risks of excessive interference in human rights. Ongoing constitutional lawsuits before the Constitutional Court already raise inquiries necessitating a more precise delineation of the standards for the delegation of legislative activity. Furthermore, given the attention already directed towards the delegation issue, it is likely that Constitutional Complaints questioning the constitutionality of statutes, specifically alleging violations of delegation standards, will see an increase.

Given that the Constitution of Georgia lacks a precise framework for the delegation of legislative activity, it falls upon the Constitutional Court of Georgia to elucidate whether the delegated authority can be further delegated, clarify the meaning of prohibiting the delegation of a fundamentally important issue, and delineate the purpose, content, and scope of the delegated authority. Simultaneously, it is crucial for the Court to establish the limits of the executive body's competence to independently create norms. The Court's prompt response to these issues and the formulation of a constitutional-legal framework for delegation are more than a mere scholarly pursuit; they are a practical necessity for ensuring the effectiveness of the principle of separation of powers and safeguarding fundamental rights and freedoms.