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RECOGNITION OF THE CONTENT OF THE NORM AS UNCONSTITUTIONAL BY THE CONSTITUTIONAL COURT OF GEORGIA – THEORETICAL OBSERVATIONS AND PRACTICAL CHALLENGES

"*It is always the application of a law,*
rather than the law itself, that is before us".

ABSTRACT

Constitutional review of norms is a mechanism established by the Constitution of Georgia, the use of which naturally places the Constitutional Court of Georgia in a kind of institutional conflict with other branches or organs of the government (such as the Parliament, the Executive Power, the President), and at the same time, it is a serious interference in the democratic process, as it implies annulment of the act adopted by the body with democratic legitimacy. This is why constitutional review bodies, both in Georgia and foreign countries, exercise caution when using the mentioned mechanism. The practice of recognizing the normative content as unconstitutional, introduced by the Constitutional Court of Georgia in the last decade, is indicative of its dynamic interrelation with political branches. This practice provides the Court with the opportunity to eliminate constitutional flaws in the norm without revoking the entire norm.

Recognizing the normative content as unconstitutional gives the Constitutional Court the opportunity to localize the potential constitutional violation and to satisfy the constitutional claim/submission in such a way as to restrict its decision to the factual circumstances/reservations related to a specific case.

Despite the fact that the Constitutional Court of Georgia first used the mechanism of rescinding the normative content in 2011, there is still no unified analytical framework

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Quote from former US Supreme Court Justice Antonin Scalia in his dissenting opinion on the case City of Los Angeles, petitioner, v. Naranjibhai Patel, et al, 576 U. S. (2015) <https://supreme.justia.com/cases/federal/us/576/13-1175/> [last accessed on 15 July 2023].

or standard guiding the Court when considering the constitutionality of the normative content, rather than the entire norm. From this point of view, the observation of the practice reveals, that identification of the normative content to be declared void requires judicial judgment and a creative approach to some extent, which should be covered by the appropriate framework, related to assigning the specific role to the Constitutional Court and defining related limitations within the scheme of distribution of power.

The aim of the paper is, on the basis of theoretical-practical observations (including comparative research) to outline the principles, which should serve as a basis for the constitutional review of the normative content. According to the opinion presented in the paper, when assessing the constitutionality of the norm, the focus on the normative content should be based on the assumption that there are situations in which the application of the entire norm would not lead to a violation of the Constitution. Also, a review of the normative content should not essentially turn into an assessment of the constitutionality of an individual decision. Separation of the normative content from the norm should not be contrary to the purpose of the legislator and should not be based on an exaggerated hypothesis regarding the application of the norm in this or that context. And finally, when recognizing the normative content as unconstitutional, the line drawn between the invalidated content, and the content, which was found as valid, should, in turn, comply with the requirements of the Constitution.

I. INTRODUCTION

The constitutional review of normative acts naturally puts the Constitutional Court in conflict with other branches/organs of the government, such as the Parliament, the Executive Power, and the President. In response, constitutional review bodies, both in Georgia and in other states, are developing mechanisms to ensure that the court does not interfere in the activities of the political branches of power more than absolutely necessary and unavoidable in a given situation, thereby safeguarding the democratic process.

The present paper aims to analyze one such mechanism, namely, the practice of the constitutional review of the normative content, introduced by the Constitutional Court of Georgia (hereinafter - the Constitutional Court) in the last decade, within the framework of which, when identifying a constitutional flaw, the Constitutional Court often no longer declares the whole norm as invalid, but instead recognizes the specific normative content of the norm as unconstitutional.

It should be noted that, until now, there is no unified and comprehensive analytical framework that provides answers to questions such as the criteria the Constitutional Court should follow when deciding whether to assess the norm in its entirety or only

in terms of specific content. In the latter case, what this content should be remains a question. Although we do not claim to provide exhaustive and final answers to the mentioned questions, we hope that the presented work will contribute to the knowledge of judicial practice, its further refinement, and in general, the development of doctrine in relation to the constitutional control of normative content.

In order to examine the above-mentioned issue, the paper reviews and compares the practice of the Constitutional Court before 2011 (i.e., before the practice of declaring the normative content invalid was introduced), and after it. The author's observations are presented as to what trends and logic can be seen from the decisions reached by the Constitutional Court at different times, from the standpoint of reviewing the content of normative acts. The factors that can explain the development of the jurisprudence of the Constitutional Court in the last decade and the theoretical-practical basis of the new approach are analyzed.

The work includes a comparative research component, specifically discussing the practice of the federal courts of the United States of America concerning the separation of 'Facial' and 'As-applied' complaints. The positions established in the American practice and doctrine are analyzed, as to when the Court should asses the norm in its entirety, and contrary to the above, when it should narrow its focus only on the assessment of the validity of the norm in a specific situation. The paper examines the relevance of the approaches and legal views developed in the USA regarding the model of reviewing normative content established by the Constitutional Court.

In the end of the paper are presented the author's conclusions as to why the Constitutional Court should give preference (as far as possible) to revocation of the normative content, instead ofrevocation of the norm in its entirety; How should the Constitutional Court determine, that in a specific case it is really possible to focus on establishing constitutionality of the normative content, and, based on what criteria it should draw the line between the normative content to be left in force, and the content, that should be invalidated.

II. REVIEW OF THE PRACTICE OF THE CONSTITUTIONAL COURT REGARDING RECOGNITION OF THE NORMATIVE CONTENT AS UNCONSTITUTIONAL

1. PRACTICE EXISTING BEFORE 2011

From its foundation and up to the present, the practice of the Constitutional Court of Georgia regarding the determination of the content of the contested normative act has not

been uniform. According to the approach prevailing until 2011, the Constitutional Court, as a rule, interpreted the contested normative act on the basis of its inner conviction, without taking into account the practice of common courts. If the Constitutional Court concluded that the norm could be interpreted in accordance with the Constitution, it would normally not uphold the claim. Such an approach is classically expressed in the following excerpt from the decision of the Constitutional Court in regard to the case of Elguja Sabauri: "When only the interpretation contradicting the Constitution is read from the normative act, in such case, the subject of the assessment becomes the normative act itself, and it should be considered as unconstitutional. Whereas in the case, when simultaneously, the interpretation corresponding to the Constitution is read from the normative act, then the subject of the assessment is an interpretation of the norm. The possibility of its dual (ambivalent) interpretation confers the characteristic of ambiguity on the norm. The constitutional presumption of the norm is applicable in case of ambiguity, and consequently, it should be interpreted in compliance with the Constitution"[1]. To some extent, such practice led to the alienation of the supporters of constitutional control from the real problems and made it less effective.[2]

It should be noted that the interpretation of the contested norm by the constitutional review body in accordance with the Constitution and, in case of doubt, finding it constitutional, is not alien to the legal systems of Europe and the USA. It is considered a compromise in the relationship between the judicial and legislative branches of power.[3] For example, according to the doctrine of constitutional avoidance, recognized by the US Supreme Court, when the validity of a law is doubted, or serious questions

[1] Judgement of the Constitutional Court on case N1/1/428,447,459 "Public Defender of Georgia, citizen of Georgia Elguja Sabauri and citizen of the Russian Federation Zviad Mania v. the Parliament of Georgia", 13 May 2009. Paragraph II-18.

[2] For example, in one of the cases, the Constitutional Court did not admit the claim and provided the following reasoning: "...the collegium comes to the conclusion, that the claimant's argumentation is based on incorrect understanding of the content of the contested norm. The interpretation of the contested norm gives different results. This position of the collegium is not changed by the fact, that the material presented by the plaintiff shows different interpretation of the contested norm in regard to a specific case by the tax authorities and common courts. According to Article 26, paragraph 3 of the Organic Law of Georgia on the Constitutional Court of Georgia "When verifying a normative act, the Constitutional Court shall take into consideration not only the literal meaning of a disputed provision, but also the intent expressed therein and its practical application, and the gist of a respective constitutional standard." This norm of the law obliges the Constitutional Court to interpret the norm not only grammatically, but also using other possible ways of explanation. As for the practice of applying the norm, its examination is relevant only when the contested norm allows for different interpretation, and it is important to find out to what extent it complies with the requirements arising from the principle of legal security". See Judgment of the Constitutional Court of Georgia on case No2/1/481 "Citizen of Georgia Nino Burjanadze v. the Parliament of Georgia", 22 March 2010. Paragraphs II-8-9.

[3] Besik Loladze and others, Constitutional Justice (East-West Management Institute 2021) 252-254 (in Georgian); Opinion of the Venice Commission: Revised Report on individual Access to Constitutional Justice, CDL-AD(2021)001, 128 <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)001-e> [last accessed on 15 July 2023].

arise regarding its constitutionality, the court first determines whether the law can be interpreted in a manner that avoids the need for consideration of its constitutionality.[4] The existence of this doctrine in the USA is explained by the factor of expediency rather than legality, in particular, by the argument that courts should minimize confrontation with the legislative branch as much as possible.[5]

However, the approach described above is less effective in conditions of such a model of concentrated constitutional control[6], where the explanations formulated in the reasoning part of the Constitutional Court's decision are not binding for common courts. Only the reasoning part of the decision carries legally binding force, and simultaneously, the Constitutional Court does not review the decisions of common courts for constitutional violations. It does not require a special effort to see, that interpretation of the norm by the Constitutional Court based on its own inner conviction and in accordance with the Constitution in conditions, when common courts have offered different interpretations of the content, and when the Constitutional Court does not have the leverage to change such interpretation, also creates certain reputational risks for the body exercising constitutional control.[7]

As it appears, to overcome the inconvenience described above and due to other practical considerations, lately the Constitutional Court has established a different approach towards the review of norms. In many cases, it refuses to declare a norm as completely constitutional or completely unconstitutional.[8] According to this practice, "if several

[4] Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (West Group 2012) 247-248.

[5] ibid 249. On the necessity of self-restraint by the Constitutional Court, see Giorgi Khubua, 'Between Constitutional Jurisprudence and Politics' (2016) 9 Constitutional Law Review 13-14 (in Georgian).

[6] It means a judicial arrangement within which constitutional control is separated from justice. The concentrated model differs from the diffused model, within the framework of which judicial bodies (common courts) also consider constitutional disputes (for example, in the USA). For more detailed information see Opinion of the Venice Commission, supra note 4, 9-19.

[7] In contrast to the above, the use of the constitutional avoidance doctrine by the Constitutional Court should be considered justified in a case, where there is no authoritative definition of a specific norm proposed by the common courts, and therefore, the Constitutional Court itself has to clarify the true content of the norm. see Decisions of the Constitutional Court of Georgia, by which the Court did not satisfy the claim, including on the grounds, that the challenged norms were subject to relevant interpretation of the Constitution, and the claimants have not submitted any examples from the practice of the common courts to invalidate the aforementioned: Judgment of the Constitutional Court on the case N1/2/503,513 "Citizens of Georgia Levan Izoria and Davit-Mikheil Shubladze v. the Parliament of Georgia", 11 April 2013; Judgment of the Constitutional Court on the case N1/3/538 "Political union "Free Georgia" v. the Parliament of Georgia", 24 June 2014. In addition, according to current legislation, the Constitutional Court is authorized to re-evaluate the constitutionality of the norm (within the new proceedings) if the practice of the common courts subsequently contradicts the interpretation of the norm by the Constitutional Court. see Article 211 of the Organic Law of Georgia on the Constitutional Court of Georgia, <https://matsne.gov.ge/ka/document/view/32944%23?publication=33> [last accessed on 15 July 2023].

[8] Besik Loladze and others, supra note 4, 80-81.

rules and interpretations are read in the contested norm, one of which is unconstitutional, the Court shall no longer recognizes the disputed norm as unconstitutional as a whole, but shall assess it, and if necessary, recognizes the specific normative content as invalid.”[9] Also, with the changed practice, “the Constitutional Court, as a rule, accepts and considers the legislative norm with the normative content, with which it was used by the common court” and it no longer replaces the definition proposed by the common court with its own interpretation.[10]

2. PRACTICE ESTABLISHED AFTER 2011

The Constitutional Court recognized the content of the normative act as unconstitutional for the first time in the judgment of December 22, 2011, in the case “*Public Defender of Georgia v. the Parliament of Georgia*”[11]. The contested provision was Article 2, paragraph 2 of the law of Georgia “On Military Reserve Service,” which states that it is “the duty of each and every citizen of Georgia to serve in Military Reserve pursuant to this norm.” The Public Defender requested in the Constitutional claim recognition of the mentioned norm as unconstitutional on the grounds, that the appealed provision, in violation of the right to freedom of belief and equality, did not provide for the possibility of refusing to go through the reserve service by persons, who have conscientious objection. Although the Constitutional Court upheld the argumentation of the Public Defender, instead of deeming the norm unconstitutional in its entirety, by its judgment, it declared invalid only the part of its normative content, which concerned the duty to perform military reserve by those persons who refuse it on the grounds of freedom of belief.[12]

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[9] Judgment of the Constitutional Court of Georgia on case N3/7/679 ““Rustavi 2 Broadcasting Company LLC” and “TVC Georgia LLC” v. the Parliament of Georgia”, 29 December 2017. Paragraph II-32.

[10] See excerpt from the decision of the Constitutional Court of Georgia in the case of Liberty Bank: “The common courts within the scope of their competency deliver final decision on normative content of the law, on its practical use and therefore on its enforcement. Therefore, the interpretation of the provisions made by common courts has huge importance for determining real content of the law. As a general rule the Constitutional Court considers and assesses the legal provision with the same normative content as it was used by a common court. However, several exceptions might exist from this general rule, among them in cases when the Constitutional Court is certain that the interpretations of the law made by same instance courts are contradictory. In such cases the content of the provision cannot be considered to be ultimately defined by common courts. Non-uniform practice of interpretation of the provision might also indicate to its vagueness and unconstitutionality. Besides that, in exceptional cases the Constitutional Court is also authorized not to agree with the interpretation of the provision made by the common court if it is clearly unreasonable”. See the Judgement of the Constitutional Court of Georgia on the case N1/2/552 “JSC Liberty Bank v. the Parliament of Georgia”, 4 March 2015. Paragraph II-16.

[11] Judgement of the Constitutional Court of Georgia on case No1/1/477 “Public Defender of Georgia v. the Parliament of Georgia”, 22 December 2011.

[12] It should be noted, that in the judgement the Constitutional Court did not discuss its own competence regarding the recognition of the normative content as unconstitutional, despite the fact that the decision

With the aforementioned decision, the Constitutional Court did not establish a tangible analytical framework or standard, as to what grounds did it consider appropriate in each specific case to discuss the constitutionality of a specific normative content of a provision, instead of considering it in its entirety. At the end of the reasoning part of the judgment, the Constitutional Court states that "neutral laws, through the establishment of general obligations, cannot account for interests of all the citizens equally." This, however, does not imply that "general obligations shall not be introduced through law or that they are essentially in conflict with the Constitution because they violate rights of specific people."[13] Based on the above it can be assumed, that in the opinion of the Constitutional Court, consideration of the normative content becomes relevant when the application of the norm does not automatically lead to violation of the Constitution in all possible circumstances of its application, but unconstitutional outcome occurs only in some constellations of application of the norm. However, as we will see below, this short description does not fully explain the logic of the subsequent decisions of the Constitutional Court and does not answer all relevant questions regarding the constitutional review of the normative content.

From a formal point of view, it is true that the annulment of the normative content by the Constitutional Court is carried out within the mandate of the negative legislator[14].

significantly changed the model of constitutional review, that was in effect before that. The mentioned novation is proposed in the judgement as a given fact, an admissible mechanism, without an additional study of its legal validity, which has been rightly criticized in the legal literature. See Ana Pirtskhalashvili, 'The real control of the Constitutional Court - still beyond the revision of the Constitution' (2017) Scientific Journal "Academic Herald" "Legal, Political and Economic Aspects of Revision of the Constitution of Georgia" 11 (in Georgian); Regarding the competence of the Constitutional Court to recognize the normative content as unconstitutional, see Also Paata Javakhishvili, 'Georgian Constitutional Court and Actual Real Control' (2017) 1 Law Journal 345-346 (in Georgian).

In this regard, we would like to note, that both the 2011 and current versions of the Constitution of Georgia and the Organic Law of Georgia "On the Constitutional Court of Georgia" do not explicitly provide for recognition of the normative content as unconstitutional, but generally refers to declaration of the legal "act or its part" as invalid. Nevertheless, we think that the practice of reviewing of the normative content can be justified by the competence granted by the legislation to declare a part of a normative act unconstitutional, which is not hindered by the fact, that the text of the norm published in the "Legislative Herald of Georgia" remains unchanged when the Constitutional Court recognizes the normative content as unconstitutional, e. i., formally the norm is not abolished, but a rule with an unconstitutional content included in the norm (sub-norm) is identified, which is declared invalid.

[13] Judgement of the Constitutional Court of Georgia on case N1/1/477 "The Public Defender of Georgia v. the Parliament of Georgia", 22 December 2011. Paragraph II-81.

[14] Regarding the function of the Constitutional Court as a negative legislator, see András Sajo, Limiting Government, an Introduction to Constitutionalism (Cézanne Publishing 2003) 285; Besarion Zoidze, Constitutional Control and Order of Values in Georgia (German Society for International Cooperation (GIZ) 2007) 61-63 (in Georgian); Judgement of the Plenum of the Constitutional Court of Georgia on case N1/466 "The Public Defender of Georgia v. the Parliament of Georgia", 28 June 2010. Paragraph II-18. The judgement of the Plenum of the Constitutional Court of Georgia on the case "Lali Lazarashvili v. Parliament of Georgia" also contains an important definition of the function of a negative legislator: "The Constitutional Court is authorized only to annul the contested norm in its entirety and/or any of

The use of the mentioned instrument, unlike the standard cases of revocation of a norm, needs to be treated with more caution since, by revoking the normative content, the court actually transforms the norm and, in this sense, even creates a new norm, which goes beyond the performance of the function of a positive legislator.[15] At the same time, the risk of exceeding the competence increases the more, the less the normative content declared invalid (that is, the boundary, that the Constitutional Court sets in the norm by canceling the normative content) is reflected in the existing legal framework, i.e. in its text, structure and history.

Returning again to the judgement adopted by the Constitutional Court in the case, related to compulsory military reserve service, we have reason to assume, that at the stage of annulment of the normative content, after the Constitutional Court established a violation of the constitutional right, it took into account another legal act in force at that time, which regulated similar relationship, namely, the Law of Georgia on "Non-military alternative labor service", which already established a relevant exception for persons with the right to conscientious objection. We mean one of the provisions of the above-mentioned law, according to which "a citizen who, in accordance with the legislation of Georgia, must fulfill his military duty, but refuses military service on the grounds of freedom of conscience, religion or belief", would be called for non-military, alternative work. As we can see, the normative content declared unconstitutional by the Constitutional Court, "which establishes the duty to perform military reserve service by those persons, who refuse military reserve service on the grounds of freedom of belief"[16], is similar to the provision in the Law of Georgia on "Non-military alternative labor service", which makes us think, that the Constitutional Court relied on the latter as an indication of the legislator's probable will, when formulating the content of the norm.

From the point of view of acting within the mandate of a negative legislator, even less controversial are the cases, when the Constitutional Court, while formulating the normative content, relies on the text of the law or bylaw, of which the challenged norm is a part. For example, in the case "Citizens of Israel - Tamaz Janashvili, Nana Janashvili,

its parts/normative content, although it cannot establish a new order, extend the validity of the contested norm, etc. Thus, the decision of the Constitutional Court can only be in the form of recognition of any normative content of the contested norm as unconstitutional, and finding it invalid." See Judgement of the Constitutional Court of Georgia on Case N3/6/642 "Citizen of Georgia Lali Lazarashvili vs. The Parliament of Georgia", 10 November 2017. Paragraph II-20.

[15] In connection with the transformation of the negative legislator's function of the Constitutional Court when finding the normative content invalid, see Dimitri Gegenava and Paata Javakhishvili, the Constitutional Court of Georgia: Attempts and Challenges of Positive Legislation, Lado Chanturia 55 (Sulkhan-Saba Orbelian University Publishing House 2018) 125-127, 132 (in Georgian).

[16] Judgement of the Constitutional Court of Georgia on case No. 1/1/477 "The Public Defender of Georgia v. the Parliament of Georgia", 22 December 2011. The first paragraph of the reasoning part of the judgement.

Irma Janashvili, as well as citizens of Georgia - Giorgi Tsakadze and Vakhtang Loria v. the Parliament of Georgia"[17] Article 426, Part 4 of the Civil Procedure Code of Georgia was contested in relation to the first paragraph of Article 42 of the Constitution of Georgia (the first paragraph of Article 31 of the current edition of the Constitution - the right to a fair trial), on the basis of which the application requesting quashing of the decision in a civil case and reopening of proceedings on the grounds of newly discovered circumstances was considered inadmissible after expiration of 5 years from the entry of the decision into legal force.

In this case, the Plenum of the Constitutional Court recognized as unconstitutional the content of the appealed norm, which provided for an extension of the statute of limitations for annulment of the decision directly to the persons defined by subparagraph "c" of the first paragraph of Article 422 of the Civil Procedure Code of Georgia (i.e., to the persons, who were not invited to the hearing of a civil case). Consequently, the Constitutional Court narrowed down the content of the contested norm by referring to the relevant provision of the law, using the limit established by the legislator in respect of the delimitation of the relations, and refused to further specify the norm by referring to such concepts, that were not provided for by the law. This is noteworthy, because the reasoning provided in the motivational part of the decision itself, in contrast to its resolution part, showed signs of a more nuanced approach.

In particular, the Plenum explained in the motivational part that, if the case involved a dispute between private individuals, in which the interests of the state were not engaged, in such a case the appealed norm would not be considered unconstitutional.[18] The Plenum based its reasoning on unconstitutionality of the norm on the argument that "the 5-year statute of limitations disproportionately limits the right to a fair trial of persons ... provided for in subsection (c) of Article 422 in the event, when a court decision ... is made in favor of the State, and at the same time, in case of existence of some of the grounds provided for in Article 423 of the Civil Procedure Code of Georgia, and besides, recognition by such persons of a court decision as invalidated is a necessary precondition for protection and restoration of their rights."[19] For the purposes of the present discussion, it is interesting that the Plenum, in contrast to the motivational part, did not separate, in the resolution part of the judgment, the decisions in favor of the state and those in favor of private individuals. It recognized the challenged norm as completely unconstitutional in this sense, specifically concerning persons defined by subsection 'c' of the first part of Article 422 of the Civil Procedure Code.

Similarly, the Constitutional Court adopts a cautious approach in its judgement on the

[17] Judgment of the Plenum of the Constitutional Court of Georgia on case No. 3/1/531 "Citizens of Israel Tamaz Janashvili, Nana Janashvili and Irma Janashvili v. the Parliament of Georgia" 5 November 2013.
[18] ibid, paragraph II-34.
[19] ibid, paragraph II-38.

case ""Metalinvest LLC" v. the Parliament of Georgia"[20], where Article 9, Paragraph 4 of the Law of Georgia "On Entrepreneurs", which states, that - "If at the moment of signing the agreement a contracting partner knows about restrictions on the business entity's management powers, the represented business entity may declare the transaction null and void within eighteen months after the date of signing the agreement. The same rule shall apply, if the authorized representative and the contracting partner are acting in concert intentionally to cause damage to the business entity represented by the representative", - was contested in relation to the first paragraph of Article 21 of the Constitution of Georgia (the first paragraph of Article 19 of current version of the Constitution - right to property). In respect of this case too, the Constitutional Court recognized the contested norm as unconstitutional in its entirety (specifically, the words "within eighteen months after the date of signing the agreement"), despite the fact that in the motivational part of the decision, it identified and separated completely valid constellations within the norm.

In particular, the Constitutional Court distinguished two cases from each other: when the conclusion of a transaction by an unauthorized person contained signs of an offence, and when on the contrary, the transaction was not concluded in a criminal manner. Regarding the first case, the Court explained that "there is no legitimate purpose that the contested norm can serve in the case, when it is related to a contract concluded by means of a criminal offense."[21] As for the second case, the Court noted, that the norm would acquire an unconstitutional content "in conditions when, despite proper supervision of the activities of the head/representative by the entrepreneur (partner), as a result of dishonest (and perhaps illegal) actions of the signatories of the transaction, the information about the transaction is hidden and unavailable to the entrepreneur".[22] In contrast to the above, "in the absence of supervision mechanisms in the enterprise, or in case of insufficient engagement of the entrepreneur (partners) in the enterprise's activities", according to the Court, the existence of such a short deadline for submitting a claim did not lead to an unconstitutional result.[23] However, as mentioned above, the Constitutional Court did not consider it necessary to separate the constitutional content of the norm from the unconstitutional content in the resolution part of the decision, and it recognized the norm invalid in its entirety.

The first decision in the practice of the Constitutional Court, where it did not base the annulment of the normative content on the line explicitly drawn in the normative act regulating the same or similar relationship and established a completely new demarcation line in the norm, was the Judgment of the Plenum of May 23, 2014, on the

[20] Judgement of the Constitutional Court of Georgia on case No. 1/1/543 ""Metalinvest" LLC v. the Parliament of Georgia", 29 January 2014.
[21] ibid, paragraph II-62.
[22] ibid, paragraph II-50.
[23] ibid, paragraph II-54.

case "*Citizen of Georgia Giorgi Ugulava v. Parliament of Georgia*"[24]. In the mentioned case, the Constitutional Court found unconstitutional in relation to the first and second paragraphs of Article 29 of the Constitution of Georgia (Article 25 of the current version of the Constitution - the right to hold public office) the normative content of Article 159 of the Criminal Procedure Code of Georgia ("An accused person may be removed from his/her position (work) if there is a probable cause that, by staying at that position (work), he/she will interfere with an investigation, with the reimbursement of damages caused as a result of the crime, or will continue criminal activities"), which provided for dismissal of persons elected by secret ballot on the basis of universal, equal and direct suffrage of local self-government. The Constitutional Court did this against the background, when criminal procedural legislation in force at that time did not even contain any reference to such officials.

In general, the study of the practice of the Constitutional Court confirms that, in the majority of cases, it does not consider it necessary to dwell additionally upon issues related to the review of normative content. Namely, such issues include the criteria the Court uses to decide whether to make the entire norm or its normative content the subject of review, and in the latter case, the criteria it uses to determine the formulation of the normative content under consideration. The reasoning often concerns establishing a constitutional violation, and not selecting a remedy for the elimination of the violation. A noteworthy exception is the judgement of the Plenum No. 3/7/679 of December 29, 2017, on the case ""Broadcasting Company Rustavi 2 LLC" and "TVC Georgia LLC" v. the Parliament of Georgia", which contains important clarifications regarding the standard of review of constitutionality of vague norms, or norms of general character, which can be broadly interpreted.[25]

[24] Judgment of the Plenum of the Constitutional Court of Georgia on the case No. 3/2/574 "Citizen of Georgia Giorgi Ugulava v. Parliament of Georgia", 23 May 2014.

[25] Two types of ambiguity of the norm differ from each other in nuances: 1. True ambiguity, i.e., a situation where the text of the norm is ambiguous in the classical sense of the word, since it can be understood in two or more different meanings at the same time, which creates uncertainty. As an example of this type of ambiguity, we can refer to the judgement of the Plenum "Young Lawyers Association of Georgia and Citizen of Georgia - Ekaterine Lomtatidze v. Parliament of Georgia", namely, the contested Article 9, paragraph 2 of the Law of Georgia "On Operative-Investigative Activities", in connection with which the Constitutional Court had to determine, whether the said norm, in conjunction with other norms of the law, allowed to carry out certain operative-search measures without a judge's order and absence of urgent necessity. The Constitutional Court determined, that the norm created ambiguity in this respect and recognized it as unconstitutional. 2. Ambiguity in a broad sense, e. i. a situation where semantically the meaning of the norm is clear, however, due to the fact, that term/terms used in the norm can be interpreted broadly, it becomes difficult in apply it to specific cases. An example of this is the judgment of the Plenum on the case "Citizens of Georgia - Aleksandre Baramidze, Lasha Tugushi, Vakhtang Khmaladze and Vakhtang Maisaya v. the Parliament of Georgia", where Article 314, paragraph 1 of the Criminal Code of Georgia was contested, which provided for criminal liability for espionage, namely processing of information "to the detriment to the interests of state …upon assignment of a foreign organization". Taken separately, the said norm was not vague in the sense, that it clearly conveyed the content and purpose of the

In the aforementioned case, the Court explained that vagueness, taken in isolation, cannot be the basis for declaring a norm unconstitutional in its entirety and, instead, attention should be focused on its specific normative content, which is problematic for the plaintiff.[26] It is significant that, as an exception, the Constitutional Court indicated the regulations establishing responsibility, in which case, according to the Court, on the basis of "paragraph 5 of Article 42 of the Constitution of Georgia [paragraph 9 of Article 31 of the current version of the Constitution - nullum crimen sine lege[27] principle] the vagueness of the disputed norm taken separately, can serve as grounds for recognizing it as unconstitutional".[28] From this point of view, the Constitutional Court partially based its judgement on the decision of the Second Cillegium of May 14, 2013 on the case "Citizens of Georgia - Aleksandre Baramidze, Lasha Tugushi, Vakhtang Khmaladze and Vakhtang Maisaya v. Parliament of Georgia", which concerned the first paragraph of Article 314 of the Criminal Code of Georgia, more specifically, the constitutionality of the words - "as well as collection or transfer of other information to the detriment of Georgia upon instructions of a foreign intelligence service foreign organization".

By the above-mentioned decision, the Second Collegium considered the words "or foreign organization" to be against the constitutional guarantee of certainty of the norms determining responsibility and pointed out, that: „In terms of foreseeability of the criminal law determining a crime, it is important to be able to establish the real content and scopes of each element of it, in order that an addressee will correctly perceive the law and carry out his action in accordance with its requirements, besides, in order to be protected from the arbitrariness of the law-enforcer …Within the context of punishment for collection and transfer of information by commission of a foreign organization, the content of the disputed norm is not explicitly and clearly defined. The law-enforcer and a person acting in the sphere of expression in every specific case should determine espionage performed by a commission of which organization shall be detrimental to the interests of Georgia. The given rule provides a very wide possibility for interpretation and in every specific case, the decision of the issue of criminal punishment for action shall considerably depend upon the individual evaluation of the law-enforcer".[29]

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norm at an abstract level, but the problem lay in its indefinite nature, since "The given rule provides very wide possibility for interpretation and in every specific case, decision of the issue of criminal punishment for an action shall considerably depend upon individual evaluation of the law-enforcer". (Infra note, II-36). Scalia and Garner, supra note 5, 33-41, 56-58, 343-346, 349-351.

[26] Judgement of the Constitutional Court of Georgia on case No. 3/7/679 ""Rustavi 2 Broadcasting Company LLC" and "TVC Georgia LLC" v. the Parliament of Georgia", 29 December 2017. Paragraphs II-30-32.

[27] Latin for "no crime without the law".

[28] Judgement of the Constitutional Court of Georgia on case No. 3/7/679 ""Rustavi 2 Broadcasting Company LLC" and "TVC Georgia LLC" v. the Parliament of Georgia", 29 December 2017. Paragraphs II-33.

[29] Judgement of the Constitutional Court on the case N2/2/516,542 "Citizens of Georgia - Aleksandre Baramidze, Lasha Tughushi, Vakhtang Khmaladze and Vakhtang Maisaya v. the Parliament of Georgia", 14 May 2013. Paragraphs II-31, 36.

Therefore, in accordance with the standard established in the case of "Broadcasting Company Rustavi 2 LLC" and "TVC Georgia LLC", in case of a norm containing undefined concepts and terms, as a rule, the Constitutional Court will not assess the norm in its entirety, i.e., all its constellations, but shall examine only the content (sub-norm), which is problematic for the plaintiff. Norms establishing responsibility are an exception, since in relation to them, depending on the essence of the basic right, the indeterminacy of the norm itself becomes the object of assessment.[30] However, there is a certain contradiction between the opinion expressed in the decision of the Plenum and the reasoning developed in the decision of the second collegium, since by the decision of the collegium the norm of the criminal law was also declared unconstitutional in its entirety in relation to paragraphs 1 and 4 of Article 24 of the Constitution (the first sentence of the first paragraph of Article 17 of the current edition of the Constitution, paragraphs 2 and 5 - freedom of expression) due to its "chilling effect": "While establishing the liability in the sphere of freedom of expression, it should necessarily comply with such standard of certainty which excludes "chilling effect" with respect to freedom of expression left outside of the regulation that defines the responsibility. The disputed norm upon the presence of certain preconditions (causing detriment to the interests of Georgia) establishes the criminal liability for relations with a wide group of persons (foreign organizations). However, the legislator leaves the issue of collection and transfer of information by a commission of which foreign organization shall be punishable for interpretation, in the hope and fate of the law-enforcer, on one hand, and to the possible subjects of the norm, on the other hand. [...] the disputed norm has "chilling effect" on the freedom of expression, because in reality it has considerably

[30] It is noteworthy that, according to the practice of the Constitutional Court, in case of establishing the vagueness or indeterminacy of the norm establishing responsibility, the Constitutional Court may not recognize it as unconstitutional in its entirety, and may instead, only invalidate its specific normative content. In particular, in the case "Giorgi Beruashvili v. Parliament of Georgia", the Constitutional Court discussed the constitutionality of the words "or other anti-social action", provided in the first paragraph of Article 171 of the Criminal Code of Georgia (First paragraph of Article 171 – "Persuading minors to get involved in beggary or other anti-social activities" was declared as punishable action) and established, that the normative content of the wording "or other anti-social activities" in paragraph 1 of Article 171 of the Criminal Code of Georgia, which provides for the possibility of imposing liability on a person for persuading a minor to commit a crime, contradicted the requirements of the first sentence of paragraph 9 of Article 31 of the Constitution of Georgia. Nevertheless, the Constitutional Court did not completely invalidate the contested norm (i.e., words - "or other anti-social action"), but declared invalid only its normative content, which provided for imposition of liability on a person for persuading a minor to commit an offence. Judgement of the Constitutional Court of Georgia on case No. 2/1/1289 "Giorgi Beruashvili vs. Parliament of Georgia", 15 July 2021.
We think that, based on the nature of the basic right established by the first sentence of Article 31, paragraph 9 of the Constitution, and taking into consideration its importance (and the decision of the Plenum of 2017), the Constitutional Court could have decided the issue of the constitutionality of the norm in a broader sense and recognized it as invalid. Presumably, in this case, the Constitutional Court took into account the fact that, according to the Criminal Procedure Code of Georgia, the recognition of the criminal law as unconstitutional has retroactive effect and leads to the revision of the judgments passed in the past.

more effect of restriction of the right than this is envisaged by the disputed norm, which the legislator wanted to restrict and which is necessary for the existence of a democratic society".[31]

Taken separately, in isolation, this reasoning reflected in the Collegium's judgement could be considered as a confirmation of the conclusion, that the norm that establishes responsibility in the field of freedom of expression, and due to its indeterminacy produces a "chilling effect", and if we extend this logic further, all norms limiting freedom of expression in general, which have such "chilling effect", are subject to annulment by the Constitutional Court in their entirety and should not be "saved" by such a surgical mechanism, as separating the unconstitutional normative content and declaring only such content invalid.

We believe, that such a conclusion would not be valid and the position proposed in the judgement of the Plenum of 2017 is more justified, which considers it permissible to discuss the unconstitutionality of the norm on the grounds of indeterminacy only in the context of Article 42, paragraph 5 of the Constitution of Georgia (Article 31, paragraph 9 of the current edition of the Constitution Clause - nullum crimen sine lege principle).[32] In addition, if we were to logically extend the argumentation of the Collegium's judgement of 2013, it would become relevant in relation to other basic rights, the constitutionality of restrictive norms of which could potentially be tested in the light of the Standard of certainty. Consequently, we would be forced, in each such case, to focus on the disputed norm as a whole, instead of the problematic normative content embedded in it. Obviously, such an approach would contradict the decision of the Plenum of 2017, which clearly established, that the basis for asserting the unconstitutionality of broadly interpreted, general norms cannot be their vagueness taken separately (except for challenging the norm in relation to Article 31, paragraph 9 of the Constitution), but the plaintiff should indicate to the problematic normative content and present relevant arguments to the Constitutional Court specifically in relation to it.

The approach developed in the decision of the Plenum is confirmed by the decision reached by the Constitutional Court in 2022 on the case "Giorgi Logua v. Parliament of Georgia", within the framework of which, due to the vagueness of the term "pornographic works", the first paragraph of Article 255 of the Criminal Code of Georgia was declared unconstitutional in relation to the first sentence of paragraph 9 of Article 31 of the Constitution of Georgia. In relation to the first sentence of paragraph 9 of the article. It

[31] Judgement of the Constitutional Court on the case N2/2/516,542 "Citizens of Georgia - Aleksandre Baramidze, Lasha Tughushi, Vakhtang Khmaladze and Vakhtang Maisaya v. the Parliament of Georgia", 14 May 2013. Paragraph II-26.

[32] Judgment of the Constitutional Court of Georgia on case No. 3/7/679 ""Rustavi 2 Broadcasting Company LLC" and "TVC Georgia LLC" v. the Parliament of Georgia", 29 December 2017. Paragraph II-33.

is noteworthy, that the votes of the judges in this case were divided into two regarding the issue, of whether the claim should be granted in the aspect of the constitutionality of the norm in relation to the basic right of freedom of expression. If the Court had upheld the standard established by the judgment of the second collegium in 2013, it logically should have recognized the challenged norm as unconstitutional in terms of freedom of expression. However, we believe the court, quite rightly, did not follow such a path, and after declaring the norm to be invalid in its entirety in relation to paragraph 9 of Article 31 of the Constitution, it did not further reason on its constitutionality in terms of the first paragraph of Article 17 of the Constitution.[33] The court substantiated this decision as follows: "Since it is impossible to precisely identify the actions prohibited by the contested norm, the Constitutional Court is deprived of the opportunity to evaluate this vague and amorphous content and scope in relation to other rights guaranteed by the Constitution of Georgia, including the freedom of expression or freedom of information protected by Article 17 of the Constitution of Georgia, and come up with accurate and objective reasoning as to the extent, to which the disputed norm limits the rights provided for by this norm of the Constitution… It is neither possible nor expedient for the Constitutional Court to hypothetically discuss the above-mentioned issues within the scope of the present claim and the normative reality... This would be tantamount to the Court first assigning a precise specific content to a norm it considers vague, and then offering its own interpretation of the norm, after which it should assess the constitutionality of the content of the norm, as understood by it, in relation to freedom of expression or other norms of the Constitution … The disputed norm presumably contains a whole range of normative content, in regard to which completely different approaches may be used, to which the plaintiff points out himself. However, at this stage, the Constitutional Court does not consider it possible, and even more so, justified to focus on one or several alleged normative contents, as long as the existence of these normative contents is not confirmed by a foreseeable and unambiguous law. The Court also takes into account that the plaintiff himself is requesting recognition of the entire norm, i.e., the first paragraph of Article 255 of the Civil Code as unconstitutional, and not establishing the unconstitutionality of any of its normative content."[34]

Therefore, it can be concluded that, according to current practice the Constitutional Court usually does not recognize the norm as invalid in its entirety due to its vague content, but will focus on the problematic normative content indicated by the claimant/ author of the submission. Regulations establishing responsibility are an exception from

[33] In this case, paragraph 6 of Article 21 of the Organic Law of Georgia on the Constitutional Court of Georgia came into force, according to which, if the votes of the members present at the plenum/college session are equally split when making a decision on a constitutional claim, the constitutional claim will be dismissed.

[34] Judgement of the Constitutional Court of Georgia on case No. 1/8/926 "Giorgi Logua vs. Parliament of Georgia", 4 November 2022. Paragraph II-50.

this rule. In such cases, the vagueness of the disputed norm may become the basis for recognizing it as unconstitutional in its entirety when assessing it in relation to paragraph 9 of Article 31 of the Constitution.

Based on the above, it is interesting to establish, which standard applies/should apply in other cases apart from the standard established for vague/indeterminate norms: when a normative act will be subject to scrutiny in its entirety, without its deconstruction into sub-norms, and contrary to this, when should/can the focus of consideration of the norm be only specific normative content, and in the latter case, what this content should be.

III. THEORETICAL-PRACTICAL VALIDITY OF THE NEW APPROACH

We have to agree with the assessment expressed in the legal literature, according to which, the Constitutional Court most likely introduced the practice of recognizing the normative content as unconstitutional[35] due to the unavailability[36] of the real constitutional control mechanism of individual decisions, namely the fact, that the Constitutional Court does not have the authority, unlike, for example, the German Federal Constitutional Court, to decide the dispute *in concreto*. Under the conditions of normative constitutional control,[37] the purpose of the constitutional dispute is to determine the constitutionality or unconstitutionality of the norm *in abstracto* (even when in order to file a claim, it is necessary to demonstrate direct interference of the public authority with his constitutional right by the plaintiff), since the satisfaction of the claim is followed by a declaration of invalidity of the norm universally, in relation to all persons, but not necessarily interference in the relations, that arose on the basis of the norm in the past, and solving the problem of a specific claimant/subject in this way. Moreover, neither the exclusive nor the main goal of normative constitutional review is to find out whether the subject's (plaintiff's) constitutional right has been violated, as the Constitutional Court, in the absence of real control, usually does not have the leverage to compensate the subject for the damage caused to him/her by an official act.[38]

[35] It refers to a model of constitutional control, where a competent body (for example, the Constitutional Court) can assess the constitutionality of individual decisions (including judicial acts).

[36] Loladze and others, supra note 4, 73-76, 255-257; Gegenava and Javakhishvili, supra note 16, 124-125.

[37] In the system of normative constitutional control, a constitutional dispute can be raised only for the purpose of appealing the norm and not the individual decision made on its basis. For more details, see the study of the Venice Commission: Study on Individual Access to Constitutional Justice, CDLAD(2010)039rev, 77 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2010)039rev-e> [last accessed on 15.07. July 2023].

[38] Opinion of the Venice Commission: CDL-AD(2018)012 Georgia - Amicus Curiae brief for the Constitutional Court on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, 30-33 <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)012-e> [last accessed on 15 July 2023].

In this case, the main goal of the constitutional proceedings is to find out whether the relevant legal norm violates the Constitution, and if its unconstitutionality is proven, to protect the constitutional order by declaring the norm invalid.[39]

Recognizing a norm as unconstitutional places the Constitutional Court in an institutional conflict with other branches of government, such as the Parliament, the Executive Power, and the President. It is a significant interference in the democratic process, as it involves invalidating decisions made by bodies with democratic legitimacy.[40] That is why the courts, not only in Georgia, but also in other states, try to apply this lever only in extreme cases, when its use is unequivocally necessary to protect the constitutional order and the rule of law. As already mentioned, the doctrine of constitutional avoidance, recognized in the theory and practice of the law, is an expression of this kind of dynamics of the relationship between the judiciary and the political branches. In principle, the same can be said about the practice established by the Constitutional Court of Georgia regarding the recognition of a normative content as unconstitutional, which allows it to avoid the possibility of complete invalidation of a normative act with every new and constitutionally questionable decision adopted by common courts, and on the basis of the doctrine of constitutional avoidance, leave in force otherwise fully valid normative content.

In addition, narrowing down the subject of the dispute by focusing on the normative content is generally better suited to the role of the court as a non-political branch of government in the system of separation of powers, and such an approach is justified by the dynamics of the relationship between the Constitutional Court and the common courts within the judicial branch itself. Focusing on the normative content contributes to the development of the institutional dialogue between the Constitutional Court and common courts. In such a situation, the interpretation of the norm by a common court in a constitutionally questionable manner (*in abstracto*) results in the Constitutional Court declaring this interpretation invalid, which leaves enough space for the common courts to interpret the norm in accordance with the Constitution in subsequent cases.

Therefore, focusing on a specific normative content instead of the entire norm gives the Constitutional Court the opportunity to localize a potential constitutional violation and to satisfy a constitutional claim or submission in such a way, as to limit its decision to the factual circumstances/reservations related to a specific case. Although, due to its mandate, the Constitutional Court in such cases does not exercise real control over

[39] Opinion of the Venice Commission: CDL-AD(2021)001 Revised Report on individual Access to Constitutional Justice, 36 <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)001-e> [last accessed on 15 July 2023].

[40] Regarding the antagonistic relationship between the Constitutional Court and the Parliament, see Giorgi Khubua, "Between Constitutional Jurisprudence and Politics" (2016) 9 Constitutional Law Review 14-15 (in Georgian); Gegenava, supra note 16, 137-138.

the decisions of the common courts, and its response will not necessarily result in an effective solution to the plaintiff's problem. However, compared to the previous practice, constitutional proceedings with this new approach are closer to the real problems posed by the plaintiffs.

The reflection of constitutional standards and values in the practice of common courts, together with establishing the practice of invalidation of the normative content, is facilitated by the approach introduced by the Constitutional Court in the last decade, according to which it usually accepts the interpretation proposed by a common court as an authoritative interpretation of the challenged norm, even if this interpretation does not represent, according to the Constitutional Court, the most reasonable/correct interpretation of the norm, including such interpretation, that would dispel doubts related to constitutionality.[41] The combination of these two approaches—reviewing the normative content and considering the interpretation proposed by the common courts as authoritative—provides an opportunity to ensure that constitutional proceedings in Georgia are not detached from reality. Within the framework of the existing model of constitutional control, this approach effectively realizes the values protected by the main law.

IV. CONSIDERATION OF THE PROBLEM ON THE EXAMPLE OF THE USA

In regard to the review of the normative content, a parallel can be drawn with the practice established in the USA in terms of separating "Facial" and "As-applied" types of complaints. In the USA, where the federal courts are competent to directly use the norms of the Constitution to resolve disputes and there is no separation between constitutional control and justice, it is considered, that the norm can be found unconstitutional in its entirety (facially invalid) only in exceptional cases. As the US Supreme Court explained in regard to the case United States v. Salerno, we have such an exceptional case where it is determined, that the norm would not be constitutional

[41] The question of which interpretation will be considered as the authoritative interpretation of the norm for the purposes of constitutional proceedings requires a separate discussion and is beyond the scope of this paper. We will only note briefly, that if the resource of interpretation of the norm in the system of common courts is not exhausted (i.e., there is no decision of the court of the final instance), it is logical and appropriate for the Constitutional Court not to consider the existing definition as authoritative a priori and to evaluate the correctness of the interpretation itself. And, on the contrary, if there is a decision of the court of the final instance on the issue, it is appropriate for the Constitutional Court to rely on the definition given in it, however inappropriate it may be. An exception to this can be the rare and theoretical case, when the interpretation made by the court of the final instance itself is so vague, that it is impossible to make sense of it, as well as when there are several conflicting decisions of the court of the final instance and the said conflict is not overcome by the same court.

under any constellation.[42] The US Supreme Court provides the following arguments against recognizing the norm unconstitutional as a whole: 1. Claims based entirely on the assertion of the unconstitutionality of the norm (and not on its application to the specific situation) are often speculative and contain the risk of premature and detached interpretation of the norm; 2. Upholding of such a claim also contradicts the fundamental principle of judicial self-restraint, according to which the court should not, without necessity, raise constitutional issues in advance, nor establish a constitutional rule broader, than the specific facts require; 3. Complying with such a demand threatens the democratic process, and in particular, the enforcement of the will expressed by the elected representatives in accordance with the Constitution.[43]

It is noteworthy, that the above-mentioned observation, which points to a rather strict test to overcome in order to declare a norm unconstitutional in its entirety (this test, as mentioned, requires that the norm should not be considered constitutional within the framework of any constellation), in turn, needs to be clarified, and it does not fully describe the US jurisprudence established by the federal courts. As evidenced by the practice of the US Supreme Court, it is quite common, that the court does not limit itself to examining the constitutionality of one aspect of a norm, and instead, assesses it as a whole.[44] An overview of the mentioned practice reveals, that the separate doctrinal tests used by the US federal courts when checking the constitutionality of norms make it possible, and sometimes even necessary, to discuss the legal validity of the norm as a whole.[45]

For example, the Supreme Court of the United States considers it admissible to recognize the norm establishing liability as completely unconstitutional due to its vagueness, even though the application of such norm to some cases may not be at all questionable from the standpoint of an objective observer. As a result, it will be considered unconstitutional to use a vague norm determining responsibility even in a situation when, based on the specific circumstances of the case, the addressee should have known, that his action would undoubtedly fall within the scope of the norm. As U.S. Supreme Court Justice Antonin Scalia famously observed in relation to one case, a statute prohibiting a group of people from congregating on a sidewalk and engaging in "annoying" conduct to passersby is completely (in all constellations) unconstitutional

[42] United States v. Salerno, 481 U. S. 739, 745 (1987) <https://supreme.justia.com/cases/federal/us/481/739/> [last accessed on 15 July 2023].

[43] Washington State Grange v. Washington State Republican Party, 552 U. S. 442, 450-451 (2008) <https://supreme.justia.com/cases/federal/us/552/442/> [last accessed on 15 July 2023].

[44] Richard H. Jr. Fallon, 'Fact and Fiction about Facial Challenges' (2011) 99(4) California Law Review 915-974, 917-918.

[45] Richard H. Jr Fallon, 'Facial Challenges, Saving Constructions, and Statutory Severability' (2020) 99(2) Texas Law Review 215-282, 219.

because of its vagueness, even though, for example, spitting in the face of a passerby will undoubtedly be considered an "annoying" act.[46]

In addition to the above, according to the approach established in the USA, norms that are worth extra protection limit the constitutional good, and therefore, their validity is checked by a strict assessment test (strict scrutiny), and in the event of identification of a flaw, they can be declared as unconstitutional in their entirety, despite the fact, that identification of problematic normative content and its surgical removal may be physically achievable.[47] Even when the regulation of a specific person's conduct/action for the purposes of the Constitution, taken separately, does not necessarily create a problem, the court may still refuse to enforce such a norm if its application causes a significant number of other cases leads to a violation of the Constitution. In applying the strict assessment test, courts examine whether the norm serves an overriding public interest and whether the proposed regulation is narrowly aimed at achieving that goal. In particular, when the regulation interferes more in the scope of constitutionally protected expression, than can be justified by an overriding public interest, the court in

[46] Johnson v. United States, 576 U. S. 11 (2015) <https://supreme.justia.com/cases/federal/us/576/13-7120/> [last accessed on 15 July 2023].

[47] Richard H. Jr Fallon, 'As-Applied and Facial Challenges and Third-Party Standing' (2000) 113(6) Harvard Law Review 1321-1370, 1138, 1346-1347. It should be noted that, based on the structure and text of the US Constitution, the list of rights (fundamental rights), restriction of which is examined by the US federal courts within the framework of a strict assessment test, is quite narrow. Except for cases of substantive restriction of freedom of speech, in fact, the mentioned test is relevant only in deciding the following two categories of cases: 1. With regard to the guarantee of a due process, when the issue is related to the violation of such a component of right to privacy, which has been recognized and protected historically; For example, in case Washington v. Glucksberg, the US Supreme Court did not consider voluntary euthanasia to be a right with similar characteristics, and evaluated intervention in this right through application of less stringent rational assessment test; In contrast to the mentioned, physical inviolability and upbringing of children, in court practice are considered such traditional rights, interference in which will be assessed by a strict assessment test; 2. In relation to the right to equality, when the issue is related to unequal treatment violating the fundamental rights, protected by the Constitution (for example, when there is different treatment in relation to the exercise of the right of the freedom of expression), on the grounds of race, ethnic origin and/or, if the victim of unequal treatment is another historically vulnerable and isolated group (minority), the need of protection of which is also evident taking into consideration historically formed/existing stereotypes. See SanAntonio School Districtv. Rodriguez, 411 U. S. 1, 411 U. S. 16, 28 (1973) <https://supreme.justia.com/cases/federal/us/411/1/> [last accessed on 15 July 2023]. Therefore, only a rational and not a strict test is applied to assess unequal treatment on the ground of age. See for example, Massachusetts Bd. of Retirementv. Murgia, 427 U.S. 307 (1976) <https://supreme.justia.com/cases/federal/us/427/307/> [last accessed on 15 July 2023], where using the rational test, the norm, that required police officers who reached the age of 50 to retire due to mental retardation, was deemed constitutional (Cleburne v. Cleburne LivingCtr.), as well as in case of such grounds, as property status (San Antonio Indep. Sch. Dist. v. Rodriguez). Less restrictive than the strict assessment test, but stricter than the rational test (intermediate scrutiny) is used for assessment of differentiation on the ground of gender and birth out of wedlock. See Clark v. Jeter, 486 U.S. 456 (1988) <https://supreme.justia.com/cases/federal/us/486/456/> [last accessed on 15 July 2023].

many cases refuses to partially "save" the norm by isolating the problematic normative content and recognizes it as unconstitutional in its entirety.[48]

Ordinarily, a norm adopted to achieve an illegitimate goal will also be considered unconstitutional in its entirety, if the purpose of the constitutional test used by the court to assess interference with rights is to establish the intention of the norm/legislator. In such a case, it is considered that the unconstitutional purpose completely permeates the norm, which excludes the identification of any of its constitutional normative content.[49]

We think, that the opinion is valid, according to which the choice between considering the norm unconstitutional on the whole, and recognizing its normative content as unconstitutional belongs to the field of judicial discretion, and is based more on arguments of practical expediency than on a formal-theoretical consideration and analysis regarding which approach is consistent with the constitution and which one is not.[50] Undoubtedly, the complete annulment of the norm, compared to the annulment of its normative content, is a much more severe sanction, that the court can use to respond to the constitutional violation and to prevent the adoption/issuance of an unconstitutional norm in the future: "When constitutional values are particularly vulnerable, the Supreme Court may apply tests, that invoke a strong defense mechanism, that necessitates repealing of a statutory provision in its entirety, and precludes step-by-step correction of the flaws of the in each subsequent case. This approach is the most appreciable when a constitutional provision protects expression or conduct, that is particularly prone to be influenced by a chilling effect, and at the same time, the legislature may show unusual inertness towards protection of this constitutional value without establishing a meaningful preventive mechanism by the courts".[51]

V. WHICH APPROACH SHOULD THE CONSTITUTIONAL COURT CHOOSE?

We think, that in Georgian reality, the direct transposition of the practice of the US Supreme Court and taking it as a guideline for determining in which cases the

[48] However, in the disputes related to the freedom of expression, according to the practice of the US Supreme Court, it is not always considered justified to correct the flaw of the norm by its invalidation as a whole. For example, on the case Broadrick v. Oklahoma, 413 U.S. 601 (1973) <https://supreme.justia.com/cases/federal/us/413/601/> [last accessed on 15 July 2023] the US Supreme Court has explained, that application of such a strict mechanism is more appropriate in relation to restrictive norms, restricting verbal rather than a behavioral/action-related form of expression. Also, the number of cases where the application of the norm leads to unconstitutional results should not be insignificant compared to the cases of legitimate application of the norm.

[49] Michael C Dorf, 'Facial Challenges to State and Federal Statutes' (1994) 46(2) Stanford Law Review 235-304, 279-280.

[50] Fallon, supra note 48, 1351-1352.

[51] ibid, 1352.

Constitutional Court should discuss the constitutionality of the norm as a whole, instead of its normative content and vice versa, would not be expedient. Although there are aspects related to the given issue in US jurisprudence and legal doctrine, which are also relevant in the Georgian context, and on which we will focus in more detail below, we believe that it would not be appropriate for the Constitutional Court to give in general preference to the invalidation of the norm as a whole when identifying each constitutional violation.

First of all, it should be noted that the catalog of fundamental rights affirmed by the Constitution of Georgia, both in terms of its scope of application and the test of justification of interference with rights, differs from the Bill of Rights of the US Constitution and various constitutional tests developed by the US Supreme Court in connection with them. In addition, if we make the assumption, that the Constitutional Court of Georgia has the competence to invalidate the normative content, it is logical to conclude that, under the conditions of the concentrated constitutional justice model, where the function of authoritative interpretation of the ordinary legislation is assigned to common courts, the Constitutional Court, as a rule, should limit itself to discussing the constitutionality of the norm (and, if necessary, by declaring it unconstitutional) within the scope of the content, that the common courts have assigned to it in a particular dispute. Such an approach leaves the opportunity for common courts to develop the practice of interpreting a norm, and to exhaust the resource of its interpretation in accordance with the Constitution within the framework established by the Constitutional Court, which, on the one hand, contributes to the development of constructive institutional dialogue between the Constitutional Court and common courts, and, on the other hand, creates such a model of the relationship of the judiciary with the legislative branch of the government, in which the arguments derived from the doctrine of constitutional avoidance are taken into account.

Practice demonstrates, that at this stage the Court has a rather delicate function to perform: i.e., to determine when it is possible or advisable to deconstruct the norm into separate normative contents, instead of invalidating the entire norm, and where the line should be drawn between the normative content to be declared void and to be left in force, which requires judicial judgment and a creative approach to some extent[52]. In this process, the court must not cross that fine line beyond which only a political body can be competent to make a decision.[53]

We think, that in this case, the position of the parties themselves regarding the given issue can significantly assist the court.[54] Moreover, in the process of formulating the

[52] Fallon, supra note 46, 236.

[53] Fallon, supra note 48, 1333; Dorf, supra note 50, 958.

[54] In the practice of the US Supreme Court, for example, there was a case when, when assessing the constitutionality of norms of the same content adopted by different states, in regard to one case the court

normative content, reconciliation/comparison of the demands of the parties, their proposed arguments, and positions, is a kind of risk insurance mechanism for the Constitutional Court, so that it does not cross the above-mentioned important line. Nevertheless, on the basis of the analysis of the decisions of the Constitutional Court of Georgia it is clear that as a rule, neither at the stage of establishing admissibility of a claim/submission, nor at the stage of the substantive consideration of the case, the positions of the parties are properly examined regarding whether the norm should be assessed as a whole, or its normative content needs to be examined, and/or what should this content be?

Below are the criteria that we think the Constitutional Court should take into account in relation to the review of the normative content. The mentioned conditions are cumulative and therefore, the norm, which is not subject to deconstruction (disintegration into normative content) according to any of the below-mentioned criteria, must be evaluated by the Constitutional Court in its entirety.

1. THE SCOPE OF APPLICATION OF A NORM

First of all, the Constitutional Court must assess whether there is, potentially, such a case/constellation of application of the norm, when the relevant constitutional provision/right would not be violated. The mentioned assessment, to a significant extent, depends on the doctrinal test that the Constitutional Court applies in regard to different practical implementation of a specific constitutional provision.[55] Only after the Constitutional Court has established that there is a case or cases of constitutional application of the disputed norm, it makes sense to continue further discussion of separation of its certain content from the norm. We would like to add here, that in Georgian reality, based on the reasoning already mentioned above in the paper, we believe that the Constitutional Court should be more careful in developing such tests, that would make it necessary to discuss the constitutionality of the entire norm within the framework of each subsequent constitutional dispute, instead of its normative content.

It is a matter of practical importance, that after the Constitutional Court decides that the implementation of the constitutional provision does not require shifting the focus to the entire norm, how (i.e., based on which methods of interpretation and which sources) it

considered the norm to be unconstitutional in its entirety, while in regard to another case, it separated the problematic normative content from the norm and in other respects left it in force. The court justified this by the fact that in case of the first dispute, the parties themselves did not raise before the court the issue of separating the norm in this way, and the court did not/could not assess/take into account such possibility independently. See Ayotte v. Planned Parenthood of Northern New Eng., 546 U.S. 320, 330-331 (2006) < https://supreme.justia.com/cases/federal/us/546/320/> [last accessed on 15 July 2023].

[55] Fallon, supra note 48, 1342, 1352, 1354-1355.

should assess whether the contested norm physically has the resource of constitutional application. We think that adherence to the principle of constitutional avoidance and respect for the role of common courts requires the Constitutional Court to act on the presumption, that the norm has the resource of such an application and not to discuss in advance hypothetically the possibility of unconstitutional application of the norm to a different situation. Only if it is clear, that the normative content to be deemed unconstitutional completely exhausts the content of the norm, it can be assumed that the norm does not have the resources of constitutional application and, therefore, it should be declared invalid.

EXAMPLE

In the case "Constitutional Submission of Kutaisi Court of Appeals on the Constitutionality of Article 19, paragraph 3 of the Law of the Autonomous Republic of Adjara on "Management and Disposal of the Property of the Autonomous Republic of Adjara", was disputed paragraph 3 of Article 19 of the Law, which established the following: "The user of the property, who does not have a document confirming the right to legitimate use of this property and who uses the property for entrepreneurial activities (for commercial purposes), is obliged, according to the written request of the Ministry, to pay the fee for transfer of the property into use to the republican budget of the Autonomous Republic of Adjara, in accordance with the market value (established on the basis of expert/audit report), for the entire period of use, but no more than from the moment of registration of the property in the ownership of the Autonomous Republic of Adjara.".[56] *The norm was appealed in relation to article 3, paragraph 1, subparagraph "p" of the Constitution of Georgia (article 7, paragraph 1, subparagraph "b" of the current version of the Constitution), according to which criminal, penitentiary, civil, administrative, labor and procedural legislation falls within the exclusive competence of the supreme state authorities of Georgia. The Constitutional Court concluded, that in this case, the law adopted by the Supreme Council of the Autonomous Republic of Adjara encroached on the exclusive competence of the Parliament of Georgia and, therefore, recognized the contested norm as unconstitutional in its entirety.*

In the given situation, of course, after the Constitutional Court confirmed the fact that the Supreme Council of the Autonomous Republic of Adjara adopted the law in violation of its competence, declaring it unconstitutional in its entirety was the only logical and correct decision, as there was no constellation within which the norm would not violate the Constitution.

[56] Judgment of the Constitutional Court of Georgia on case No. 3/4/641 "Constitutional Submission of Kutaisi Court of Appeal on the Constitutionality of Article 19, paragraph 3 of the Law of the Autonomous Republic of Adjara on Management and Disposal of the Property of Autonomous Republic of Adjara", 29 September 2016.

As elsewhere, difficult and controversial cases can exist here too. For example, in the case "Citizen of Georgia Tina Bezhitashvili v. Parliament of Georgia", the Constitutional Court found unconstitutional in relation to Article 42, paragraph 9 of the Basic Law (Article 18, paragraph 4 of the current edition of the Constitution, the right to full compensation for damages inflicted by public authorities) second sentence of Article 112 of the Law of Georgia on Public Service, which stipulated, that "for the period of forced absence, the employee will be given a salary of no more than 3 months."[57] *To whom does the mentioned norm apply - to all illegally dismissed civil servants who suffered damages, or only to those civil servants whose losses exceed 3 months of official severance pay?*

2. THE POSSIBILITY OF DIVIDING THE NORM INTO SUB-NORMS (SEGMENTS OF NORMATIVE CONTENT)

Recognizing the normative content as unconstitutional should be based on the assumption that the norm can be divided into sub-norms, which independently of each other carry the general signs characteristic of a legal norm. As a result of full or partial satisfaction of a claim or a submission, the normative content considered invalid or left in force by the Constitutional Court must meet all the criteria of abstractness and generality, which are traditionally required from a norm, and it must not be limited by circumstances closely related to specific legal relations in such a way, that it becomes essentially difficult or impossible to generalize/extrapolate such norms to similar relationships in the future. Therefore, despite narrowing down the subject of a dispute, the Constitutional Court should not go beyond its mandate when reviewing the constitutionality of a normative act, and essentially should not turn into a body evaluating the constitutionality of an individual decision.

EXAMPLE

As an example of a violation of the above-referred criteria can serve the judgment adopted on the case "Evangelical-Baptist Church of Georgia", LEPL "Evangelical Lutheran Church of Georgia", LEPL "The Highest Administration of all Muslims in Georgia", LEPL "The Redeemed Christian Church of God in Georgia" and LEPL "Pentecostal Church of Georgia" v. the Parliament of Georgia.[58] *The following words of the first paragraph of Article 63 of the Law of Georgia "On State Property" were disputed in relation to the right to equality in the mentioned case: "The Government*

[57] Judgment of the Constitutional Court of Georgia on case No. 2/3/630 "Citizen of Georgia Tina Bezhitashvili vs. Parliament of Georgia", 31 July 2015.

[58] Judgment of the Constitutional Court of Georgia on case No. 1/1/811 ""Evangelical-Baptist Church of Georgia", LEPL "Evangelical Lutheran Church of Georgia", LEPL "The Highest Administration of all Muslims in Georgia", LEPL "The Redeemed Christian Church of God in Georgia" and LEPL "Pentecostal Church of Georgia" v. the Parliament of Georgia", 3 July 2018.

of Georgia makes a decision on the transfer of state property into ownership free of charge. Based on the decision of the Government of Georgia, state property can be transferred free of charge to internally displaced persons from the occupied territories of Georgia, as well as to the Apostolic Autocephalous Orthodox Church of Georgia". By the decision of the Court, the normative content of the words on transferring of the state property free of charge to the "Apostolic Autocephalous Orthodox Church of Georgia" was declared unconstitutional.

The following critical opinion stated in the concurring opinion of Judge Eva Gotsiridze attached to the said judgment is noteworthy: "Although it is true that the Constitutional Court is in the role of a negative legislator, and its function is only to identify and invalidate a norm or some of its unconstitutional normative content, this does not mean that by declaring a specific normative content of individual words as unconstitutional, it should make the constitutional normative content of the norm difficult to foresee, or sometimes make it completely impossible to understand, whether this norm continues to operate even with some constitutional normative content. This issue is necessary for legal certainty for those, who have to apply it, as well as those, in regard to whom it should be applied; especially in the period of time, before the legislator legalizes the new edition of the norm, and even more so, when a new norm will not be adopted at all."[59]

3. TAKING INTO CONSIDERATION THE INTENT OF THE LEGISLATOR (LAW)

Severing of the normative content and its subsequent invalidation should not contradict theintent of the legislator (law): if the legislator would not have adopted the norm with the content, that is assigned to it as a result of invalidation of the normative content considered unconstitutional, in such a situation the Constitutional Court should refrain from assessing of the normative content and instead focus on the norm.[60] For example, according to interpretation of the US Supreme Court, after the Court determines that a part of the norm, or separate cases of its application are unconstitutional, the Court must answer the question, if the legislator, in case of partial invalidation of the norm, would have preferred to keep the norm with the remaining (narrowed) content, or its entire revocation.[61]

[59] The same can be said in regard to Judgment of the Constitutional Court of on case №1/2/671 ""Evangelical-Baptist Church of Georgia", NNLE "Word of Life Church of Georgia", LEPL "Church of Christ", LEPL "Pentecostal Church of Georgia", NNLE "Trans-Caucasus Union of the Seventh-Day Christian-Adventist Church", LEPL "Caucasus Apostolic Administration of Latin Rite Catholics", NNLE "Georgian Muslims Union" and LEPL "Holy Trinity Church" v. the Parliament of Georgia", 3 July 2018.

[60] For more details, see Emily Sherwin. 'Rules and Judicial Review' (2000) 6(3) Legal Theory 299-322.

[61] Ayotte v. Planned Parenthood of Northern New Eng., 546 U.S. 320, 330 (2006) < https://supreme.justia.com/cases/federal/us/546/320/> [last accessed on 15 July 2023].

4. AVAILABILITY AND PREDICTABILITY OF THE NORMATIVE CONTENT

Another requirement can be considered as a direct continuation of the above-mentioned criterion, which must be met when the normative content is recognized as unconstitutional. In particular, in the process of formulating the normative content to be repealed, the Constitutional Court should not essentially become a positive legislator: such a situation will arise if the normative content, which the Court leaves in force, does not properly reflect the structure and history of the normative act, as a result of which the newly formed norm is rather a result of the Court's creativity, than that of the norm-maker.[62] Abrogation of normative content should not be based on hypothetical reasoning or exaggerated hypothesis on the part of the Court regarding separation of the norm into sub-norms in one way or another."[63] The easier available or tangible is the wording of the Court, which it should use as a basis for invalidation of the unconstitutional normative content, the less is the risk of exceeding its competence and interfering with the competence of the legislator by the Court. In connection with this, in the first chapter of the paper we have already mentioned that, from the point of view of acting within the mandate of the negative legislator, less controversial are the cases, where the Constitutional Court, when canceling the normative content, relies on the limits explicitly set by the legislator in the normative act regulating the same or similar relationship.

The US Supreme Court explains in one of its judgments, that in order to solve this issue, it is important to determine how clearly the court has articulated in its own practice the permissible scope of interference with the right, which should guide it in assessing the impact of application of the challenged norm on different constellations, and how easily the court will be able to cross the line between the constitutional and unconstitutional normative contents of the norm.[64] If the constitutional framework/principles that regulate a given legal relationship are vague, or it is difficult to draw the appropriate line in the norm, the court will not sever the norm into sub-norms and evaluate it as a whole.[65]

[62] Fallon, supra note 48, 1333-1334.

[63] "The Supreme Court, as a rule, does not consider itself obliged to hypothetically sever the law in such a way, which does not follow from the text of the challenged law itself or, as in the case of Ayotte - from existing constitutional norms and principles." Fallon, supra note 45, at 958; Fallon, supra note 46, at 263-264.

[64] See supra note 62 supra, 329.

[65] ibid.

EXAMPLE

In the case "Political Union of N(N)LE Citizens Political Union "New Political Center", Herman Sabo, Zurab Girchi Japaridze, and Ana Chikovani against the Parliament of Georgia", was disputed constitutionality of the first sentence of paragraph 2 of Article 203, of the Election Code (The procedure for compiling a party list for the parliamentary elections to be held before the parliamentary elections of Georgia of 26 October 2024 shall be defined by a political party or an electoral bloc in such a way that at least one person of each four persons on the party list submitted to the CEC chairperson must be of a different gender.) in relation to the first sentence of paragraph one of Article 24 of the Constitution of Georgia (the right to participate in elections).[66] *The plenum considered unconstitutional the content of the contested norm, which stipulated that at least one person in every four on the electoral list before the parliamentary elections of Georgia of 26 October 2024 must be male.*

In this case is noteworthy the dissenting opinion of the Judge Eva Gotsiridze attached to the judgment, where she notes: "Another aspect that strengthens my doubts regarding the partial satisfaction of the claim is related to the understanding of what different normative contents the disputed norm contains. Namely: whether the normative content, that was declared unconstitutional, was really the normative content of the contested norm; What is the relationship between the content of the disputed norm, and its two different "normative contents" found as constitutional and unconstitutional, and can we perceive the given norm as a mechanical, arithmetic sum of its two above-referred normative contents [...] Between the disputed norm and its two presumed "normative contents" there is no such simple interrelationship of the part and the whole, that would seem possible to easily remove the unconstitutional normative content from the norm and retain the constitutional content. Based on the above, it is difficult for me to imagine, that the contested norm has exactly those two normative contents, one of which my colleagues considered constitutional, and the other unconstitutional. In my opinion, the contested norm has only one normative content and it implies the mandatory quota for both genders in the party lists. It is the "quota for both genders" that creates a single normative given, which is enclosed in a single legal envelope, and it is not correct to artificially divide it into two completely independent parts. Accordingly, the plenum of the Constitutional Court had to recognize the contested norm as constitutional or unconstitutional in its entirety. Instead, the Court preferred another, third solution, as a result of which in fact, it created a new norm based on the contested norm. That's why I think that the Court, intentionally or unintentionally, played the role of a positive legislator. This type of problem - the artificial division of the norm into "normative contents", may come up on the agenda again and again".

[66] Judgment of the Constitutional Court of Georgia on case No. 3/3/1526 ""N(N)LE Citizens Political Union "New Political Center", Herman Sabo, Zurab Girchi Japaridze and Ana Chikovani v. the Parliament of Georgia", 25 September 2020.

5. COMPLIANCE WITH THE REQUIREMENTS OF THE CONSTITUTION WHEN SEVERING A NORM INTO SUB-NORMS (NORMATIVE CONTENTS)

And finally, when recognizing the normative content as unconstitutional, the line drawn by the Court between the annulled content, and the content left in force, in turn, must correspond to the requirements of the Constitution, at least in terms of the provision of the basic law, in relation to which the question of the constitutionality of the norm arose.[67] The new rule, which in such a case is elaborated by the Court based on the disputed norm, should not itself contradict the corresponding provision of the Constitution. It is debatable, whether in such a case the Court should take into account not only the specific constitutional norm, with respect to which the constitutionality of the norm is considered, but also other constitutional provisions. Taking into consideration the reputational risks that may be associated with the recognition of the normative content once formulated by the Constitutional Court as unconstitutional in another case, it is appropriate for the Court to take into account at least those constitutional interests/ principles, that derive from the essence of the case, and resolve a specific dispute in such manner.[68]

EXAMPLE

In the case "Citizen of Georgia Ilia Chanturaia vs. Parliament of Georgia", the Constitutional Court considered the constitutionality of paragraph 9 of Article 212 of the Civil Procedure Code of Georgia in relation to the first paragraph of Article 42 of the Constitution of Georgia (the first paragraph of Article 31 of the current version of the Constitution - the right to a fair trial).[69] *The contested norm stipulated, that in cases of disruption of order at the hearing, disobedience to an order of the presiding judge, or disrespect towards the court, the presiding judge may, following deliberation in the courtroom, issue an order to penalize the participant of the trial and/or the person attending the hearing without oral hearing and was not subject to appealing. The Constitutional Court separated from the norm the content that referred to issuing an order on the expulsion of a person present at the proceedings without an oral hearing*

[67] Fallon, supra note 46, 236.

[68] In addition, we do not think justified the opinion, expressed in the dissenting opinion quoted above, according to which there is no possibility of further appealing of the normative situation, created as a result of the judgment of the Constitutional Court in relation to any other constitutional provision, in compliance with the general rules. See supra note 67, Judge Eva Gotsiridze's dissenting opinion on case No. 3/3/1526 " N(N)LE Citizens Political Union "New Political Center", Herman Sabo, Zurab Girchi Japaridze and Ana Chikovani v. the Parliament of Georgia", 25 September 2020.

[69] Judgment of the Constitutional Court of Georgia on case No. 2/2/558 "Citizen of Georgia Ilia Chanturaia v. Parliament of Georgia", 27 February 2014.

and considered that in this part the norm met the requirements of the first paragraph of Article 42 of the Constitution, while in the remaining part, it considered that the norm violated the constitutional right. Accordingly, the Constitutional Court recognized as unconstitutional part of paragraph 9 of Article 212 of the Civil Procedure Code of Georgia, except for the normative content, which referred to issuing of an order on expulsion of a person present at the session without an oral hearing.

VI. CONCLUSION

In the present paper, based on theoretical-practical observations (including comparative research), we tried to outline those principles, on which the constitutional review of the normative content should be based in the Georgian reality. Examination of the practice of the Constitutional Court confirmed, that until now no general framework has been established, on the basis of which it would be possible to determine when and by applying what criteria does the Constitutional Court evaluates the normative content. According to the opinion presented in the paper, it is advisable to pay more attention to the mentioned issue during constitutional proceedings and to properly indicate in the substantiation the reasons, on the basis of which preference was given to a specific alternative of elimination of the violation of the Constitution (including, if the norm as a whole becomes the subject of the Court's assessment, why it was not considered necessary to limit the focus to an examination of specific normative content, and vice versa).

As a conclusion, the paper proposes criteria, that must be met cumulatively in order for the Constitutional Court to review the normative content, namely: there must be constellations within which the application of the norm will not lead to violation of the Constitution, i.e. the norm must have a constitutionally legitimate normative content; The review of the normative content should not essentially turn into an assessment of the constitutionality of an individual decision; Separation of the normative content from the norm should not contradict the legislator'sintent and should not be based on an exaggerated hypothesis regarding the application of the norm in different contexts; When recognizing the normative content as unconstitutional, the line drawn between the repealed content and the content left in force, in turn, must comply with the requirements of the Constitution. Hence, the norm, which is not subject to deconstruction into normative contents according to any of the criteria listed above, should be assessed by the Constitutional Court in its entirety.