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SEPARATION OF POWERS IN THE CONSTITUTIONAL COURT'S CASE-LAW

ABSTRACT

Separation of powers is an "elastic concept". Many authors recognize an unwavering interest of legal experts towards the principle of separation of powers, acknowledging at the same time, the complexity of the concept. In recent years, the Constitutional Court of Georgia has increasingly been applying the principle of separation of powers when examining the constitutionality of the presented cases.

This study approaches the principle of separation of powers from a different perspective. It does not aim to analyze the theory of separation of powers but to consider its application in the context of positive law. Specifically, it examines how the Constitutional Court of Georgia, in its case law employs this principle as a standard, as defined in Article 4, paragraph 3 of the Georgian Constitution, which states: "The state authority is exercised based on the principle of separation of powers." As a result, the inclusion of this provision in the Constitution transforms the principle of the separation of powers to a positive constitutional norm.

Whereas the principle of the separation of powers has been enshrined as a constitutional norm, the Constitutional Court is obligated to pursue the compliance of the normative provisions it judges upon, with this norm. To accomplish this, the court should develop its own concept of the separation of powers, which will be gradually reinforced through its judicial practice.

A review of the Constitutional Court's case-law shows that when confronted with a legislative provision potentially affecting the functional separation of powers, the Court tends toward supporting a "separatist doctrine" (also known as a "separation doctrine" or "non-delegation doctrine'). At the same time, it ensures that none of the government branches encroaches on the functions assigned to the others. However, in some cases the Constitutional Court refrains from applying the separatist doctrine given that the Constitution explicitly provides for permeability of the principle of the separation of powers that Court cannot override.

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I. INTRODUCTION

In the legal doctrine, the classical theory of the separation of powers is often being criticized for having lost its original meaning and not reflecting the modern system of arrangement of state power, as a result.[1] The separation of powers is referred to an "an elastic concept" with a "purely rhetorical nature",[2] and, as some note, "a mythical concept long detached from reality,"[3] which should be removed from legal science.

Nevertheless, as P. Jan notes: "Montesquieu's theory of the separation of powers has never ceased to be in the center of attention of constitutionalists, politicians, and judges […] The issue is as fundamental to the study of constitutional systems as it is difficult to resolve it completely."[4] Many authors recognize an unwavering interest of legal experts to the principle of separation of powers, acknowledging at the same time, the complexity of the concept.

Since 2010, the Constitutional Court of Georgia has increasingly been referring to the principle of the separation of powers when examining the constitutionality of the legal normative acts/provisions (bylaws) appealed.[5] However, the functions of the Court itself is difficult to differentiate from the perspective of the separation of powers, and also given its duty of guarantor of human rights.[6] Studying the issue of separation of powers from any angle and scope, therefore is not devoid of academic interest.

This research offers to apply a different - complementary approach when studying the topic. It does not focus on analyzing the theory behind it but rather discusses the application of the separation of powers in the context of positive law. More specifically, the article explores the standard of applying the said principle by the Constitutional Court of Georgia in its judicial practice based on Article 4, paragraph 3 of the Georgian Constitution of 1995, which states that "The state authority is exercised based on the principle of separation of powers." Advancement of the constitutional case law has undoubtedly strengthened the principle of the separation of powers as a legal norm.

As stated above, the purpose of this study is to analyze the application of the principle of the separation of powers in the Constitutional Court of Georgia's judicial practice.

[1] Pierre Pakte, F. Mellen-Sukramanian, Constitutional Law (First Georgian edition, Tbilisi University Press) 166 (in Georgian).

[2] Pierre Avril, La séparation des pouvoirs est-elle un concept opératoire? <http://www.droitconstitutionnel.org/congresParis/comC6/Avril.html.> [last accessed on 29 April 2024].

[3] Chloé Mathieu, La séparation des pouvoirs dans la jurisprudence du Conseil constitutionnel (Droit. Université Montpellier 2015) 21.

[4] Pascal Jan, Les séparations du Pouvoir, in Mélanges Gicquel-Constitution et pouvoirs (Montchrestien 2008) 255.

[5] Judgment of the Constitutional Court of Georgia on case N1/466 "Public Defender of Georgia v Parliament of Georgia", 18 June 2010. Paragraph II-18.

[6] Jean-Michel Blanquer, La distance parcourue: de l'ordre institutionnel à l'ordre constitutionnel, in Le Conseil constitutionnel a 40 ans (LGDJ 1998) 26.

This principle is defined as restriction of powers by dividing responsibilities, and allocation of various state functions. However, the article does not explore the principle from the general perspective but rather studies its definition and further application by the Constitutional Court as a constitutional norm, i.e. focuses on the analysis of the positive law. This is because the principle of the separation of powers is no longer purely theoretical, but rather solidified by the Constitution of Georgia, which states in Article 4, paragraph 3 that "The state authority is exercised based on the principle of separation of powers." Consequently, this constitutional article transforms the principle of the separation of powers into the constitutional norm.

The increasing references to this principle by the Constitutional Court consolidated its position within the positive law, opening new horizons for research. Now when the separation of powers has been transformed into the constitutional norm, the Constitutional Court must ensure a compliance of bylaws with it, and for this purpose, develop its own concept of the separation of powers, which will gradually be revealed upon analyzing its judicial practice.

Such research is essential for deepening knowledge of positive law and examining some doctrinal prerequisites. Those include the opinion that the principle of the separation of powers has become weak and ineffective along with strengthening the principle of majority and parliamentary system; or the argument that it serves merely as a tool for ensuring rights.[7] Therefore, studying the Constitutional Court's case law is necessary in order to define what exact concept of the separation of powers is enshrined in positive law.

In verifying the constitutionality of bylaws, the Constitutional Court employs the principle of the separation of powers alongside other constitutional norms. However, the said principle has its own specifics stemming from its nature, scope, and the issues being examined. Thus, this study holds on the assumption that these specifics allows the court contribute to the arranging the state power and, consequently, to the functioning of the system. This assumption arises from the court's adherence to the mechanical theory of the Constitution, defining the document as a set of functions it can perform in terms of political and social organization through its internal mechanical structure.[8] By adopting a permeable concept of the division of powers, the court can reinforce the idea that the law is incapable of governing and restricting political power.[9] On the other hand, by adopting an impermeable concept, the court may position itself as the guardian of the Constitution maker, the sole entity capable of ensuring provisions that deviate

[7] Régis Fraisse, L'article 16 de la Déclaration, clef de voûte des droits et libertés (2014) 44 Les nouveaux cahiers du Conseil constitutionnel 9-21.

[8] Apostolos Papatolias, Conception mécaniste et conception normative de la Constitution (Bruylant 2000) 528.

[9] Louis Favoreu, La politique saisie par le droit (Economica 1988) 153.

from the principle of the separation of powers through putting in place the mechanisms of cooperation or interdependence. Surely, the Constitutional Court is not the only body that can influence the organization of power and functioning of the system; this concerns all institutional players.[10] However, the principle of the separation of powers provides the Constitutional Court with a privileged tool to fulfill this task.

The second assumption underlying the present research is that there is a connection between the principle of the separation of powers and the guarantee of rights. This view is widely shared in academic literature,[11] however the scholars does not always agree with the nature of the connection. Some authors emphasize complementarity,[12] while others point to the differences or at least contradictions between the separation of powers and the guarantee of rights.[13] Therefore, examining the Constitutional Court's case law with regards to the principle of the separation of powers will help trace the above-mentioned connection and define its nature.

Finally, this research is based on a third assumption arguing that there is a significant distinction between the separation of political power, on the one hand, and the separation of political and judicial powers, on the other hand. In the first case, the focus is exclusively on the institutions and the organization of power. The second refers the judge and, indirectly, the litigant, and so is essentially linked to the guarantee of rights. This assumption is primarily supported by the observation widespread among legal scholars. Most authors, like B. Mathieu, believe that "division between judicial and political powers has become the matrix of modern political systems, at least in the Western model."[14] The division of political powers, where it still remains effective, plays only a minor role. This assumption is primarily supported by the practice of the French Constitutional Court, an analysis of which shows that the Constitutional Council applies the principle of the separation of powers differently, depending on whether it concerns the separation of "political powers" or the separation of political and judicial powers.

The study of the Constitutional Court's case law demonstrates that, when it comes to the application of the principle of the separation of powers exclusively towards political authorities, the Court refers an impermeable or a "separatist" approach.[15] In other

[10] Jacques Meunier, 'Les décisions du Conseil constitutionnel et le jeupolitique' (2003) 105 Pouvoirs 29-40.

[11] Anne-Marie Le Pourhiet, 'La limitation du pouvoir politique: la garantie des droits subjectifs face à ladémocratie politique' (2015) 102 Revue française de droit constitutionnel 277-286.

[12] Dominique Rousseau, 'Le droit constitutionnel continue: institutions, garantie des droits et utopie' (2014) 6 Revue du droit public 1517-1533.

[13] Patrick Wachsamnn, 'La séparation des pouvoirs contre les libertés?' (2009) 12 Actualité juridique droit administratif 617-619.

[14] Bertrand Mathieu, Justice et politique: la déchirure? (LGDJ lextenso éditions 2015) 9, 45-46.

[15] Oliver Beaud, Le Conseil constitutionnel et le traitement du Président de la République: une hérésie

words, when addressing the independence of political bodies from one another or the preservation of their functional integrity, the Court applies an impermeable concept of the separation of powers. At the same time, acting as the guardian of the Constitution, the Court unequivocally holds that the Constitution is the only instance authorized to allow deviations and exceptions from the above-said principle. Thus, except for the cases where the Constitution explicitly provides for some degree of permeability (the cases when the Court examines the provision of organic or functional separation of political powers), the Court consistently judges in favor of impermeable conception of the separation of powers. This is a systematic judicial practice of the Constitutional Court, which is guided by a dogmatic approach to the separation of political powers; and with this, the Court elevates the concept of the separation of political powers to a high indisputable principle. This analysis does not address the application of the principle of the separation of powers in the cases involving the relationship between political authorities and judiciary.

II. SEPARATION OF POWERS: THE NOTION, CONCEPT AND DEFINITION

Studying the separation of powers requires distinguishing between the notion and the concept. In the dictionary of foreign terms, a "concept" encompasses a higher degree of abstraction than "notion",[16] serving as a kind of substrate/foundation. The notion refers to the theoretical application of the concept and, as such, is subject to variability, whereas the concept is unique. In the context of the separation of powers, before addressing the concept (2), it is necessary to first examine the notion, or rather notions (1) in order to come up with the definition of "separation of powers" (3) according to the requirements of the present study.

1. NOTIONS OF THE SEPARATION OF POWERS

The notion of the separation of powers varies among authors. Montesquieu's original idea was developed in his *The Spirit of the Law (*Chapter VI, Book XI). The author argues that by default, no free states exist; therefore, political liberty can be found under the following two conditions: a) a moderate nature of the state and b) absence of abuse of power. The first condition is met by the mere absence of despotic rule. On the other hand, whereas (as states Montesquieu) a man invested with power is prone to abuse it,[17]

constitutionnelle (Jus Politicum 2013) 11.

[16] Dictionary of Foreign Terms <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=3&t=20862> [last accessed on 29 April 2024].

[17] Charles Louis Montesquie, The Spirit of Law (The Caucasus Institute for Peace, Democracy and Development 1994) 180-181 (in Georgian).

the second condition of creating a specific mechanism comes in, allowing "a power to be a check to a power." Drawing from the English constitution of his time, Baron de la Brède developed a theory of the separation of powers[18], where he divided state power into three branches and proposed a network of functional interaction among different state bodies. Hence, Montesquieu's system is a complex framework of interlinked institutions - the executive branch should be able to restrain the legislative branch, and despite it does not refer the latter, the legislative branch retains the right "to inspect how the laws it has passed are enforced."[19] The reason behind this asymmetry is complex and disputable, however important for author's way of thinking. Montesquieu views the legislative power differently from executive power, arguing that the latter "has by nature its own limits"[20]; so do not require restraint while the legislative power is unlimited and requires restriction. However, within the legislative branch, connections are created that make two parts mutually dependent: "one check another by the mutual privilege of rejecting"; and "they both are restrained by the executive power, as the executive body itself is by the legislative." [21]

Thus, the outcome is as follows: "These three powers should create peace and tranquility. But as they are compelled to move due to the necessary motion of things, they are forced to act in concert." [22] The bodies "can do nothing against each other and nothing without each other." [23] In other words, the system described by Montesquieu consists of three bodies that represent distinct and independent powers. However, this division, which they embody, is only organic and personal. By their function and substance, these three powers are interconnected and can restrain one another. The result is an interdependence of bodies strong enough to ensure moderate governance, yet balanced enough to avoid endangering political liberty. Hence, the following two scenarios are possible to unfold: the degree of interaction among the bodies could create a deadlock, almost inevitably resulting in one body or an external separate entity seizing power that is against the established institutional structure. Alternatively, as Montesquieu suggests, the "necessary motion of things" may propel this institutional and interdependent structure forward. In other words, the mechanism may fail, but if it works, the result will be constructive.

The original idea of the separation of powers was laid down in *The Spirit of the Law*, yet soon was reinterpreted by doctrine, resulting in elaborating alternative notions

[18] ibid, 181-193.
[19] ibid.
[20] ibid.
[21] ibid.
[22] ibid, 190.
[23] Charles Eisenmann, L'Esprit des lois et la séparation des pouvoirs, in Mélanges Carré de Malberg (Sirey 1933) 187.

without damaging the original theory.[24] There were Montesquieu's contemporaries,[25] who, when revisiting his works, discovered alternative ideas regarding the separation of powers. These include the British notion[26] of the "balance of powers," rooted in Bodin's writings,[27] or the "theory of checks and balances" developed by the authors of American Constitution.[28] Variations of Montesquieu's original theory also emerged such as "strict/rigid separation of powers", "flexible separation of powers", and "non-fusion of powers".[29] Other new interpretations of the original notion appeared later; applying the separation of powers not only to three main branches of state power but to the majorities and opposition,[30] central and local governments,[31] and constituent and constituted powers.[32]

All above-mentioned doctrinal developments view the separation of powers as a descriptive concept. The vast diversity of doctrines therefore brings certain confusion, necessitating to shift to a higher level of abstraction in order to fully comprehend the essence of the concept discussed.

2. THE CONCEPT OF SEPARATION OF POWERS

To emphasize the "substrate" nature of separation of powers and thus understand the concept, one must first contextualize the motion that gave rise to Montesquieu's original idea. Then, it is necessary to examine the various notions of the separation of powers, which must be carrying common features as they offer different usage of the same concept.

The foundations of Montesquieu's theory can be found in the works of some authors predating Baron de la Brède by centuries. After all, "The separation of powers and balance among constitutional functions are modern ideas that can rarely be found before 18th century. However, as we can explore the history for tracing the continuity of a political idea despite the risk of criticism from historians claiming that there two identical epochs don't exist, one may also examine whether the same concept could

[24] Mathieu, supra note 3, 22.
[25] Benjamin Constant, Fragments d'un ouvrage abandonné sur la possibilité d'une constitution républicaine dans un grand pays (Aubier 1991) 506.
[26] Mauro Barberis, 'Le futur passé de la séparation des pouvoirs' (2012) 143 Pouvoirs 6-7.
[27] Jean Bodin, Les Six Livres de la République 1576.
[28] Kenneth Janda at al, Amecian Democracy, the US Govermnet and Political Process (JSI publishing 1995) 55 (in Georgian).
[29] Mathieu, supra note 3, 23.
[30] Eric Thiers, 'La majorité contrôlée par l'opposition: pierre philosophale de la nouvelle répartition despouvoirs?' (2012) 143 Pouvoirs 61-72.
[31] Jean-Pierre Dubois, 'Une révolution territoriale silencieuse: vers une nouvelle séparation des pouvoirs' (2002) 281 Esprit 122-136.
[32] Emmanuel Siéyès, Qu'est-ce que le Tiers-Etat? (Ed. Paléo 2012) 134.

manifest itself differently in earlier era." [33] Montesquieu's concept of the separation of powers fits easily within a broader motion aimed at restricting power and combating arbitrariness, which coincided with the appearance of the notion of power, the highest point of advancement of which, both qualitatively and quantitatively, is its separation.

Moreover, it seems possible to identify certain features, which are common to all notions of the separation of powers and use them to first construct a concept, and formulate its definition. Regardless of the author, the notion of the separation of powers always has certain "constants": First, it always involves a division of bodies - or groups of bodies - identified as power carriers. Second, it should be ensured that these bodies – or groups of bodies, are arranged to balance one another, implementing various authorities - or sets of authorities - in such a way that "power shall stop power."

Thus, the concept of the separation of powers can be understood as the method of restricting power by dividing its carriers and distributing various powers among them, ensuring that "power stops power" and, guaranteeing the civil liberty as a result. M. Troper seems to perceive the concept of the separation of powers from the negative perspective, arguing that "no single body should accumulate all powers regardless of how those powers are distributed." [34]

3. DEFINITION OF THE SEPARATION OF POWERS

Proceeding from the concept of separation of powers it is possible to define the term "separation of powers" as well as a set of other terms falling under the same concept. The separation of powers is a principle designed to put a restrain on power, identify groups of bodies that hold power, and distribute the portfolios of responsibilities or privileges among them.

This definition is, of course, minimalistic yet it brings some advantages. First, it avoids favoring any of the doctrinal interpretations of the concept. Whereas this study is focused on examining the concept through the prism of positive law, it is preferable to read this analysis with an open mind, without *a priori* accepting any standpoint. This raises the issue of autonomy of the Constitutional Court concerning various doctrinal positions. In general, case law and academic discourse address two different aspects - the separation of powers as a norm, and the separation of powers as a theory. However, when faced with the task of interpretation of the principle of separation of powers, the Constitutional Court might find itself under the influence of the one or more doctrinal perspectives. Moreover, when the Constitutional Court's comments on the legal

[33] Patrick Auvret, La séparation des pouvoirs dans l'Antiquité (mémoiredact 1978) 50.
[34] Michel Troper, "L'évolution de la notion de séparation des pouvoirs" in Francis Hamon et Jacques Lelièvre (dir.), L'héritage politique de la Révolution française (Presses universitaires de Lille 1998) 101.

practice, these two types of discourses may converge or conflict. Hence, the influence of legal doctrine on the Court's legal practice cannot be excluded. On the other hand, the Court seems to develop its practice on the separation of powers independently from the doctrine: firstly, the court sometimes maintains the approach of the separation of powers; and secondly, the convergence of discourses of doctrinal and judicial practice is not necessarily linked to the influence of doctrine on constitutional judge. Lastly, the proposed "minimalistic" definition helps us explain why the notion of "separation of powers" appears in the constitutions of various countries without necessarily pointing to the same organizational framework of power.

III. APPLYING SEPARATIST DOCTRINE FOR PROTECTING THE LEGISLATIVE FUNCTIONS EFFECTIVELY

P. Avril argues that General de Gaulle back in 1958 used the notion of the separation of powers as "a mask used by those conveying the message which is different from what they do explicitly state."[35] The author criticizes the use of a flexible notion of the separation of powers to justify the concept of unifying political powers, by stating that the separation of power is a theory that is "ideally imprecise when it comes to its preferable understanding",[36] which is used for political purposes the most often. In this sense, the initial choice of the constituent power is decisive. Although the logic of the separation of powers leads to the principle that this division of power should be impermeable (as confirmed by the Article 4, paragraph 3 of the 1995 Georgian Constitution), the Constitution therewith provides for certain adjustments to enable the governments "act in coordinated way." Depending on the political adjustments made to the separation of powers, the constituent power is likely to favor one of the two main political powers, either executive or legislative.

The choice made by a constitution-maker with regard to the separation of powers and possible subsequent deviations is crucial for defining the nature and functioning mode of the government. According to J.-P. Camby: "The separation of powers is […] the subject of the Republic's primary agreements, and one might wonder what role the Constitutional Court can play in this process per se, given that this institution is neither the supreme nor the federal court, and its creation contradicts the French constitutional tradition based on the myth of the absolute sovereignty of the law."[37] Indeed, when

[35] Pierre Avril, "La séparation des pouvoirs et la Ve République: le paradoxe de 1958", in Alain Pariente (dir.), La séparation des pouvoirs, théorie contestée et pratique renouvelée (Dalloz 2006) 80.

[36] Perrine Preuvot, L'articulation des pouvoirs sous la Vème République: vers de nouveaux équilibres? (contribution au 8ème Congrès mondial de droit constitutionnel de Mexico des 6, 7, 8, 9 et 10 décembre 2010) 5 <http://www.juridicas.unam.mx/wccl/fr/g14.htm> [last accessed on 29 April 2024].

[37] Jean-Pierre Camby, 'Le Conseil constitutionnel et la régulationdes pouvoirs publics' (1997) 177 Administration 28.

deciding whether the provisions submitted to it comply with the principle of separation of powers, the Constitutional Court must refer to the institutional architecture and balance provided for in the Constitution. The concept of the separation of powers adopted by the court is therefore crucial.

The separatist doctrine in fact compels the Constitutional Court to adopt an impermeable concept of the division of powers in order to maintain the separation of functions provided for by the Constitution. A so-called negative incompetence of the legislator is an old concept first introduced by Laferrière to describe the situations where "an authority, instead of extending its competences, remains below them and refuses to act, declaring him/herself incapable to perform." [38]

By its Judgment[39] of 28 December 2017, the Constitutional Court of Georgia deemed a negative incompetence of the legislator as unconstitutional. Since then, the Court believes that any legislative provision, with regard to which the legislative body has not exhausted its authority within the framework of the Constitution, should be subject to scrutiny, particularly when it affects a constitutionally guaranteed right or freedom. This approach aligns, at least in principle, with the doctrine of the separation of powers, as a non-exhaustion of legislature's competences allows authorities, acting on the basis of the bylaws, interfere with the legislative domain. Once adopting this opinion, the court decided to refer to the separatist doctrine when defining a negative legislative incompetence in its case law (1.). It should be stated, however, that the negative legislative incompetence is not a violation of the separation of powers in itself; but rather creates the conditions under which such violations may occur. Hence, the reference to the separatist doctrine in this context seems to be utilized to its maximum extent, for the reasons that are not unusual to the interests of the Constitutional Court (2).

1. APPLYING SEPARATIST DOCTRINE TO THE NEGATIVE LEGISLATIVE INCOMPETENCE

The criticism of negative legislative incompetence stems from interpretation of the constitution from the perspective of the separation doctrine (1.1.), which is broadly reflected in the Constitutional Court's case law (1.2.).

[38] Georges Bergougnous, 'L'incompétence négative vue du Parlement' (2015) 46 Les Nouveaux Cahiers du Conseil Constitutionnel 41.

[39] Judgement of the Constitutional Court of Georgia on case N2/7/667 "JSC Telenet v. Parliament of Georgia", 28 December 2017. Paragraphs II-55-59.

1.1. INTERPRETING CONSTITUTION THROUGH THE SEPARATIST DOCTRINE

By denouncing negative legislative incompetence, the Constitutional Court calls the legislative authority to fully exercise the functions assigned to it by the Constitution. In other words, when the legislative authority intervenes in the areas assigned by the Constitution to the Law, the former should terminate its authority.

A judicial policy aimed at denouncing any demonstration of negative incompetence is not surprising. On the one hand, it is predictable from a legal standpoint as it aligns with the spirit of the Constitution. "The reservation to restrict the right based on the law naturally implies that the legislative body (the parliament of Georgia) can not only limit the right but in individual cases also delegate the settlement of the issue to another state body." However, the applicable practice of the Constitutional Court of Georgia has already introduced certain conditions "under which the delegation of authority is prohibited." [40] Thus, it can be concluded that any delegation of legislative functions to the executive branch, unless carried out according to the procedure prescribed by the constitution, shall be deemed unconstitutional. Hence, as stated above, the judgment of the Court isn't surprising as it complies with a traditional principle of reserved legislative competences, which ultimately rest on legislature.[41] Finally, this position aligns with the Constitutional Court's judicial practice of the separation of powers, from the perspective of the separatist doctrine, even if the court does not explicitly refer to these grounds. Indeed, the doctrine assumes that a political authority cannot waive or transfer its competence to another political authority; meaning that each political authority must fully exercise the competences assigned to it. Thus, the division of functions retains its full meaning and serves as a principle, the deviation from which is allowed only through constitutionally established procedures. For example, in its Judgment of February 11, 2021, the Constitutional Court deemed the delegation of authority to the executive body as compliant with the Constitution. The Court concluded that the Law of Georgia "on Public Health" manifests with sufficient clarity the will of the legislative body, specifying the criteria, which the executive body should follow in its decisions: "During Pandemic times, introducing temporary rules (other than those established by other bylaws) such as the rule regulating the movement of people and associated with the property and public gatherings, is not an issue of primary importance, requiring a decision of the parliament. Although it is an effective mechanism to ensure adapting to rapidly changing environment and normalization of extraordinary circumstances, and therefore, delegating these authorities to the government of Georgia is justified by the

[40] Judgment of the Constitutional Court of Georgia on case N1/7/1275 "Alexander Mdzinarashvili v Georgian National Commission on Communications", 2 August 2019. Paragraphs II-29, 33.

[41] Jerome Trémeau, La réserve de loi: compétence législative et Constitution (Economica 1999) 301.

need of providing a timely and effective response to the threats caused by Pandemic."[42]

Moreover, the condemnation of negative incompetence seems consistent with the logic of judicial strategy. As C.-M. Pimentel notes, "a competent court will have a direct interest in expanding the scope of authorities of the subject being under its constitutional control in order to proportionally increase its own powers as well." [43]

1.2. APPLYING SEPARATIST DOCTRINE IN JUDICIAL PRACTICE

The Constitutional Court may denounce a provision on the grounds that it manifests a legislator's negative incompetence, with the ultimate aim of safeguarding the domain of law. "This indeed serves as a guide for the Constitutional Court's actions, as evidenced by the articulation of the principle of negative incompetence, which may vary in formulation depending on its basis but not in its objective." It is the legislature, who must "adopt clearly formulated and precise provisions to protect legal subjects from unconstitutional interpretations or the risk of arbitrariness that might result in administrative or judicial bodies to issue rules that the Constitution reserved exclusively for the Law. [44] This does not extended to the cases, when non-compliance with these rules (referred to by the French Constitutional Council as inaction or neglect) is punishable." [45]

According to distinction proposed by P. Rappi[46], the negative legislative incompetence denounced by the Constitutional Court can be explicit, where the legislative authority exempts the state body from the competences assigned to the latter, or implicit, where a legislative provision does not exhaust the competence of the legislature without resorting to a non-legislative body. In the first case, a legislative provision is considered constitutional provided that the reference made in the bylaw to the executive body is reasonably limited by the legislature.

The judgement of the Constitutional Court of Georgia dated 2 August 2019 is an example to this.[47] The Court reviewed a provision of the regulation approved by Resolution No. 3 of the National Communications Commission of Georgia titled "the Regulation on

[42] Judgement of the Constitutional Court of Georgia on case N1/1/1505, 1515, 1516, 1529 "Paata Diasamidze, George Chitidze, Eduard Marikashvili and Lika Sajaia v the Parliament of Georgia and Government of Georgia", 11 February 2021. Paragraph II-60.

[43] Carlos-Miguel Pimentel, "De l'Etat de droit à l'Etat de jurisprudence? Le juge de l'habilitation et la séparation despouvoirs", in Alain Pariente (dir.), La séparation des pouvoirs, Théorie contestée et pratique renouvelée (Dalloz 2007) 21.

[44] Conseil constitutionnel N2005-512DC du 21 avril 2005, Loid'orientation et de programme pour l'avenir de l'école, J.O. du 24 avril 2005, 7173, Rec.p. 72, cons.9.

[45] Bergougnous, supra note 38, 47.

[46] Patricia Rrapi, L'accessibilité et l'intelligibilité de la loien droit constitutionnel. Etude du discours sur la "qualité de la loi" (Dalloz 2014) 176.

[47] See supra note 40, I-3.

the Provision of Services and Protection of Consumer Rights in the Field of Electronic Communications," imposing obligation on the internet domain provider to block a website to prevent the dissemination of prohibited content, take appropriate measures to remove such content from the network and prevent transmission of messages containing such content. The Constitutional Court stated that "the formal constitutional requirement on regulating certain matters be regulated by law is reserved to the Parliament of Georgia. Specifically, the Constitution of Georgia explicitly specifies those issues, the authority of regulation of which falls exclusively within the competence of the Parliament of Georgia."[48] As reads the Judgement: "The Parliament of Georgia has a general authority to regulate social relations and introduce binding rules of social conduct."

The task of regulation of the issues of fundamental importance calls for a governmental architecture, in the framework of which the binding rules of conduct are enforced by the different arms of government, which in its turn, makes the constitutional mechanism of checks and balances effective.[49] The Court further stated that "in the present case, the Parliament is the legitimate body authorized to elaborate a unified state policy as well as establish constitutional standards for interference with this right." Simultaneously, these standards have a universal nature; they do not require adaptation to changing circumstances or frequent modification, and the permissible limits of restriction of the right are inherently linked to introducing the strict constitutional standards, that can, in their turn, be modified through a transparent legislative procedure conducted at the legislative level. [50]

By offering this analysis, the Constitutional Court seeks to ensure that when legislative body delegates the authority to define procedures for implementing legislative provisions to the state body entitled to issuing relevant bylaws, it does not therewith, grant to the latter the discretionary powers of defining the fundamental rules or principles established by the legislative authority. According to the Constitution, the legislative authority is the body tasked with establishing the fundamental rules and principles in the fields specified in the Constitution. Consequently, in all such cases, the authority to intervene through bylaws is limited to the secondary competence of the state body, aimed at determining the methods for enforcing these rules.

In the second instance, when the negative incompetence is manifested implicitly, the court ensures the full exercise of the competence of the legislative body. The Judgement of the Constitutional Court of Georgia of 28 December 2017 is the example of this.[51] The provision under review pertained to the general rule for calculating property tax for enterprises/organizations, as established by Article 202, paragraph 1 of the Tax

[48] ibid, II-24.
[49] See supra note 40, II-27.
[50] ibid, II-37.
[51] See supra note 39.

Code of Georgia, according to which, the tax is calculated based on the book value of taxable property. The plaintiff argued that "under the contested norm, the property tax is not calculated in accordance with rule established by law but rather at the discretion of the tax authority, thus making a tax burden of the taxpayer unpredictable. That is because the legislature establishes two different methods for tax calculation, depending on the discretionary authority of the tax authority."[52] This delegation principle cannot be deemed constitutional. Hence, the Court upheld the plaintiff's argument and judged that "the discretionary power of the disputed norm is absolute in nature, the differential treatment resulted by it is not backed by any reasonable criteria, and so the disputed norm allows for discriminatory treatment […] Therefore, it violates the right protected under Article 14 of the Constitution of Georgia."[53] As the example shows, the will to limit the arbitrariness of the executive body compelled the court to denounce the provision containing negative incompetence.

Since recent times, the court's concern regarding the quality of the law has also led to denouncing of implicit negative incompetence. Eg.: in its Judgment of 15 December, 2023, the Constitutional Court stated that "Foreseeability and accessibility of law are essential prerequisites for imposing constitutional liability and ensure protection of person against arbitrariness of executive body […] A legal norm must be clear, unambiguous and specific enough in terms of substance as well as the subject, purpose, and scope of regulation […] A law imposing liability that fails to meet the requirements of foreseeability and accessibility […] shall be deemed unconstitutional." [54]

Thus, the doctrine of separation, to the extent that it obliges the court to denounce any provision allowing intervention of the executive authority, acting on the basis of the bylaw with legislative functions leads not only to protection of the legislative function and its carrier but further advancement of the quality of the law.

Driven by the need for a foreseeable interpretation of the Constitution against the backdrop of separatist doctrine, the Constitutional Court is compelled to denounce legislature's negative incompetence, regardless of the form in which it manifests itself. Although this fits harmoniously into the Court's judicial practice concerning the functional aspect of the principle of separation of political powers, the prohibition established by the latter carries a certain specificity compared to other controversial hypotheses falling into this category.

[52] ibid, I-6.

[53] See supra note 39, II-59.

[54] Judgement of the Constitutional Court of Georgia on case N3/5/1502, 150 "Zaur Shermazanashvili and Tornike Artkmeladze v. the President of Georgia and the Government of Georgia", 15 December 2023. Paragraph II-131.

2. APPLYING SEPARATIST DOCTRINE TO ANALYZE THE SPECIFICS OF NEGATIVE LEGISLATIVE INCOMPETENCE

Despite none of the legislative provisions containing negative incompetence directly violates the principle of the separation of powers, such potential nevertheless does exist. By turning to the authority acting on the basis of the bylaw or failing to exhaust its competence, the legislature does not directly breach the principle of the separation of powers; however, by creating the opportunity for activating the bylaw causes the violation of the above principle. In other words, the principle of separation of powers is not breached by the legislature's inaction but by the potential consequences of this inaction. It is only at the second stage, that the authority acting on the basis of the bylaw tasked with interfering with the legislature in order to compensate for the legislative gaps, may violate the principle of separation of powers. This indirect nature of violation is exactly what explains the fact that the constitutional court does not directly refer to the principle of the separation of powers for denouncing the negative incompetence of the legislator.

By denouncing the negative legislative incompetence, the Constitutional Court intervenes before any breach of the principle of the separation of functions between the legislative body and the body acting on the basis of the bylaw, occurs. The Court penalizes only the legislature's negative incompetence to prevent a violation of the principle of separation of powers, which happens only when the authority actin on the basis of the bylaw exploits the gaps left by the legislator, thereby assuming positive incompetence. Consequently, when negative legislative incompetence arises in the legal system (whether because it is not denounced by the Constitutional Court or because it has not been submitted for its review) it is often the general courts, who through the administrative proceedings define and penalize the fact of violations of the separation between the legislative and subsequent legal/normative functions. The judgment of the Supreme Court of Georgia is an example of the above-mentioned, which denounced the obvious fact of negative incompetence; however, limited itself with annulling the administrative act on the grounds of incompetence, without referring to the argument of violation of the principle of separation of powers. As stated by the Chamber of Cassation of the Supreme Court: "An unjustified restriction of the private interests of G.S. based on the Resolution of the Tbilisi Municipality Council dated 30 December, 2014 is confirmed by the failure to demonstrate the priority of protecting public interests through such a restriction. Hence, the disputed normative act violates not only the requirements of the Law of Georgia on "Basics for Spatial Planning and City Construction" but also the criteria for restricting property rights established by Article 21 of the Constitution of Georgia, under the condition of the presence of a necessary public need." [55]

[55] Judgement of the Chamber of Cassation of the Supreme Court of Georgia on case Nbs-1233 (k-18) 18 March 2020.

This particularity leads to the another one. Generally, the principle of separation of powers is understood as a tool to protect one branch of power from the actions of another. However, an indirect nature of the refusal arisen due to the negative legislative incompetence, modifies the scheme to certain extent. Indeed, by denouncing the negative incompetence, the Constitutional Court does not protect the legislative authority from the interference of executive branch, as the latter cannot act until a legislative provision enters into force. Instead, by protecting the legislative body, the court protects the latter from itself.[56] As G. Bergouniou notes, negative legislative incompetence is not the only instance, where the Constitutional Court protects the legislative branch from itself.[57] Consequently, the field of domain of legislative action is not maximal but minimal, it is "a some kind of impenetrable field from which the legislative branch cannot be removed even with its consent."[58] On the other hand, the particularity of the negative incompetence is easily explained by the specifics of the Constitutional Court. Indeed, the Court cannot judge that a bylaw violates the principle of the separation of powers, interfering with the legislative authority granted to the latter by the Constitution. Therefore, it has developed a mechanism to combat, albeit indirectly, the interference of executive authority into the legislative functions of the parliament.

Moreover, the Constitutional Court's policy regarding the negative legislative incompetence rejects the idea that the principle of separation of powers has become ineffective in today's political phenomena of majority rule. Denouncing negative incompetence enables the court to restrain the supremacy of the majority by ensuring that decisions in the major fields of the law shall be made in the framework of the parliament. Consequently, the political minority shall be able to engage in discussions and present the arguments, which would not happen had the court allowed these powers to shift to the executive branch. Thus, the principle of separation of powers remains an effective tool for dividing responsibilities, even in parliamentary systems.

Despite its unique features, negative legislative incompetence is fully integrated into the Constitutional Court's judicial practice. This is because, like all those cases, where the Constitution does not permit deviations, it is assessed by the court through the lens of the separatist doctrine, ensuring that any legislative provision undermining the separation of functions is deemed unconstitutional.

[56] Guillaume Drago, 'Le Conseil constitutionnel, la compétence du législateur et le désordre normatif' (2006) 1 Revue du droit public 45.

[57] Georges Bergougnous, 'Le Conseil constitutionnel et le législateur' (2013) 1 Nouveaux Cahiers du Conseil Constitutionnel 5.

[58] Thierry Renoux, 'Le principe de légalité en droit constitutionnel français' (1992) 31 L.P.A. 21.

IV. CONCLUSION

Whereas the Constitution of Georgia does not provide for adjustment or deviation from the principle of functional division of political powers, the Constitutional Court of Georgia rigorously adheres to the separatist doctrine. On the one hand, this enables the Court to protect the executive branch of the government from direct or indirect interference from the parliament. On the other hand, the Constitutional Court favors a "separatist" interpretation of the principle of division of powers in order to preserve the integrity of legislative function. Thus, the court denounced all manifestations of negative legislative incompetence that would allow am executive authorities acting on the basis of legal normative act (bylaw) to encroach upon legislative functions.

Consequently, the Constitutional Court's judicial practice with regard to the functional division of powers is characterized by application of the separatist doctrine and the court's commitment to ensure the genuine independence and full functional autonomy of political bodies. In cases when the Constitution explicitly provides for adjustments or deviations from adhering to the principle of division of powers, or when it is dictated by its own interests, the court does omit or simply refuses to apply the separatist doctrine altogether.