Shota Kobalia*

THE ESSENCE OF THE ENTITLING NORM IN THE CONTEXT OF THE TWO CONCEPTS OF LIBERTY AND THE DOGMATIC PECULIARITIES RELATED TO ITS CONSTITUTIONAL CONTROL

ABSTRACT

The purpose of this paper is to discuss the nature of the entitling norm with respect to the fundamental constitutional principles and the well-established concepts of normative philosophy regarding positive and negative liberty as well as to consider its relevance with the projection of the government's power, and to determine its constitutional and legal features.

This paper affirms the statement, that in case the norm is in substantial connection with the realization of civil and political rights, the core of which is the negative liberty, notwithstanding its formally entitling nature, cannot be considered as entitling, from a dogmatic perspective. The paper criticizes the practice of the Constitutional Court of Georgia and identifies logical, as well as substantive cases of inconsistency in judicial reasonings

Key words: *entitling norm, negative freedom, constitutional control*

* Free University of Tbilisi, 4th year student; Shkoba16@freeuni.edu.ge

INTRODUCTION

In the modern constitutional framework, the law constitutes an exclusive form of execution of political power[1]. The goal of a liberal constitution is not to "establish" human rights and freedoms, but rather to organize and limit the government so as to realize the rights and freedom – inherent attributes of a human, due simply to the fact that they are humans and do not owe its regulation, positivization and practical execution to the Supreme Law of the State – Constitution.

The similar ideological approach has vital importance for the analysis of the systematic logic of the social order established by the Constitution and for its implementation at all institutional levels. In the legal system based on constitutional values, human freedom, is a so-called "default"[2] statement as the State does not provide freedom. Rather it states only restrictions, with a very specific reason: to balance the interests worthy for protection in conflict. Public authority has the sole instrumental value within these processes. The "default" nature of the individual's autonomous sphere represents the major value in the abovementioned.

Legal norms can be divided into two categories: entitling and binding (or obligatory), depending on the nature of regulating both, vertical and horizontal relations.

This paper will analyze the forms of political power, exercised by the public authorities, providing individuals with powers, in a substantive sense, as well as the forms that create the illusion of the entitling nature of the norm.

A CONSTITUTION ON THE EDGE OF THE POSITIVE AND NEGATIVE CONCEPTS OF LIBERTY

Law is a form of social order, where moral imperatives, set out in the society, find reflections. Human rights, in their essence, constitute requests of moral nature, from the part of the individual, containing the moral subject matter of the society and the State[3]. Liberty is one of the moral categories that is the core part of the various rights and forms the basis for an individual's legal subjectivity. Liberty as a moral and political ideal is systematically discussed in Isaiah Berlin's famous essay "Two Concepts of Liberty", through which he distinguishes the notion of negative and positive liberty:

1 Grimm, D. (2012). *Oxford Handbook of Comparative Constitutional Law: Types of Constitutions* (pp.104). Oxford University Press.

2 Primary data that exists until external forces change it
https://dictionary.cambridge.org/dictionary/english/default

3 Dworkin, R. (1977) *Taking rights seriously*, London: Duckworth

> „The positive definition of liberty becomes effective when we try to answer to the questions: "Who is governing me?", "Who should tell me what to do?" or "What should I do and who should I be?", and not when the questions arise: "What can I do?" and "Who can I be?" Thus, the link between democracy and an individual's liberty is significantly weaker than many supporters of one or the other may believe. The desire of self-governance or to take part in the process of governance of one's own life can be as great as the desire to have free field-action, and historically, perhaps even be older. However, in the relevant case, we don't want the same. Actually, the subjects here are completely different, and it was this circumstance that led us to the great clash of ideologies that subjugated our world. The "positive" idea of freedom implies not freedom "from" (as the negative freedom implies), but freedom "to" – freedom to live according to the rules of life"[4].

Thus, freedom **from something** is negative, whereas freedom **to something** is positive. Negative freedom focuses on the process of identifying the autonomous sphere – a person is free if he or she does not experience the impact of external power on his or her autonomous sphere, and for positive freedom, the starting point is not the process but the outcome – the extent to which the person has the appropriate conditions for self-realization. Accordingly, negative freedom can be understood as a freedom of "opportunity", while positive freedom – as freedom of "realizing" one's rights.

Negative freedom represents the core of civil and political rights. So for example, rights such as: freedom of expression, the right to privacy, the right to physical integrity, the right to life, and so on, contribute to the realization of a specific aspect of the autonomous sphere, the sphere protected by each of these rights is inviolable until it experiences external intervention. On the other hand, positive freedom is the basis of economic, social and cultural rights, the so-called positive rights[5].

Although the Constitution is the product of traditional liberal thinking, for which the starting point is the negative notion of freedom – the exclusion of external interference in autonomy, in some cases it also includes positive notions, e.g.: The right to work in safe working conditions protected by Article 26 of the Constitution of Georgia, the right to receive a pre-school education guaranteed by Article 27 and the right of a citizen to provide quality health care services protected by Article 28 (1).

A clear manifestation of the boundary between positive and negative notions as of the cores of rights is the right to equality protected under Article 11 of the Constitution of Georgia, according to the first paragraph of which:

> *All persons are equal before the law. Any discrimination on the grounds of race, colour, sex, origin, ethnicity, language, religion, political or other views, social affiliation, property or titular status, place of residence, or on any other grounds shall be prohibited.*

4 Berlin, I. *Two concepts of liberty: an inaugural lecture delivered before the University of Oxford Clarendon Press on 31 October 1958* (pp.131). Oxford

5 Sunstein Cass R. (1993). *Against Positive Rights Feature*. 2nd East European Constitutional Review 35

The Constitutional Court of Georgia, in the interpretation of Article 14 of the edition of the Constitution of Georgia acting before December 16, 2018, stated the following:

> "In order to understand the essence of Article 14 of the Constitution of Georgia, it has to be noted that the fundamental significance relies on the difference between equality before the law and the parity. Within the framework of this principle, the parity of people cannot be considered as a main objective and function of the State, since this would contradict with the idea and right of equality itself. The idea of equality ensures equality of opportunity and guarantees equal opportunities for self-realization of people in different fields."[6]

A new edition of the Constitution of Georgia (Article 11, Paragraph 3) has been supplemented with a provision that differs substantially from the logic of the first paragraph:

> *The State shall provide equal rights and opportunities for men and women. The State shall take special measures to ensure the essential equality of men and women and to eliminate inequality.*

Pparagraph 2 of Article 11 of the Constitution of Georgia, in comparison to paragraph 1, provides the protection of the equality of results – the State undertakes to ensure the actual parity (and not equality) of women and men in different segments of social relations. The requirement of the first paragraph of Article 11 of the Constitution of Georgia is protected insofar as the legal act does not establish a different legal regime for substantially equal persons. It leaves the possibility for individuals to act in their own autonomous space, albeit this would cause different actual results in substantially equal conditions. As for paragraph 3, the primary importance is not the scope of the autonomous sphere, but the result, even if its realization is caused by factors beyond the autonomy of the individual (ex: the Gender Equality Program implemented by the State). Equalization of individuals implies filling the legal spaces that the autonomy of the individual cannot cover independently. On such occasions, any measure taken by the State at that time can be considered as entitling.

Conditionally, if the first provision of the act issued by the State prohibits the use of freedom of movement for individuals living in point A, the second provision of the same act allows persons between the ages of 18-25 to move before 18:00. It will be dogmatically unjustified if the second provision would be qualified as an entitling norm. On a given occasion, the field of relations concerns the realization of civil-political rights, freedom of movement, which is a benefit protected by the field of individual negative freedom. If we analyze this relationship within the framework of systemic logic, we find that the State can only limit it, regardless of the verbal framework of the norm. Supposing the opposite will lead us to argue that the State can create a person's negative freedom, which is a conceptual and philosophical inaccuracy even when the second provision of the Act, in a formal sense, is entitling. On the other hand, if an act issued by the State allows individuals with disabilities

6 *See* Judgement of the Constitutional Court of Georgia, *N2/9/810,927*, 7 December, 2018

to access the relevant inventory within the framework of a social program, it will represent an act of substantive entitlement, as the positive notion of freedom has been realized.

THE PRACTICE OF THE CONSTITUTIONAL COURT OF GEORGIA IN TERMS OF DOGMATIC IMPERFECTION

The approach of the Constitutional Court of Georgia to identify the entitling norm may become of practical importance and, therefore, a subject of a wide theoretical discussion. The Constitutional Court of Georgia is a body, overseeing so-called abstract constitutional control, that determines not the constitutionality of decisions made by common courts, but the constitutionality of the norms restricting fundamental human rights.[7] The Constitutional Court of Georgia represents a negative legislator. It does not elaborate new normative material, but rather abolish the norm/normative content inconsistent with the Constitution.[8] The qualification of the norm as an entitling, in main cases, precludes its constitutional control over it, since constitutional control implies the determination of compliance with the Constitution of the rule of restrictive behavior in the field of fundamental rights and does not define the issue of expanding the scope of the right. (The exception may be the right to equality, for which equal treatment by the State is a cornerstone, regardless of whether the norm limits a person's autonomy or not.)

According to the general standard established by the Constitutional Court of Georgia:

> "The lack of application of the entitling norm on the different legal relation does not constitute a restriction of the right per se."[9]

The lawsuit filed by Nodar Gogitashvili, a citizen of Georgia, against the Parliament of Georgia, is a clear demonstration of the issue related to the restriction of the autonomous sphere by the negative freedom and the entitling norm. He considered it absolutely unconstitutional to define the circle of persons enjoying the right of long-term visitation in prison and the impossibility of establishing direct contact with a homosexual partner in relation to the right to free development of the individual. The Constitutional Court did not accept the claim on the following merits:

> *"Article 16 of the Constitution of Georgia contains the substantive material right. The constitutionality of the disputed norm in relation to the above-mentioned right can be examined only if*

7 *See* Judgement of the Constitutional Court of Georgia, *1/23/824, II -13,* 28 December, 2018

8 Sweet, S. (2010). *Constitutional Courts* (p.6). New York Press

9 *See* Ruling of the Constitutional Court of Georgia *N2/11/654* court ruling, II-2-5. 31 July 2015

the appealed normative rule restricts the scope of the article protected by the Constitution. In order to substantiate the relationship between the appealed norm and the above-mentioned provision of the Constitution, it is necessary to prove that the appealed norm establishes a restriction on the effective use of any component of the substantive law.

PACE Code lists the number of persons with whom a convict can exercise the right to a long visit. This norm, substantially is of a restrictive nature and it does not prohibit the use of long-term visitation. Otherwise, the disputed norm does not have the legal nature restricting the material right"10.

The core of a person's right to free development is the negative notion of freedom, it claims the freedom of the individual as *"Default"* and protects all aspects of personal life that are not covered by other provisions of the Constitution. The ability to communicate directly with a favored person is one of the components of the right to privacy[11], imprisonment, with the restriction of the autonomous sphere restricted by negative freedom, leads to the restriction of the sphere protected by the right to privacy. In other words, in a given legal relation, there is a case by imprisonment, the State first limits the autonomous sphere of the individual protected by the free development of the individual, and then "returns" to a certain group of individuals a small volume of the already limited autonomous sphere. To insist that the norms appealed by Nodar Gogitashvili are intitling, and thus, it has nothing to do with the right to free development of the individual, it is tantamount to say that in the area protected by the right to free development of the prisoner's personality, there is no possibility of establishing communication with the desired person. Under these conditions, the question of the demarcation of the line between internal and external restriction of constitutional right becomes vague[12]. The internal restriction of the constitutional right derives from the structure of the legal sphere protected by the Constitution. An external restriction is legitimately based on the prospect of restricting this area of the legal system. Conditionally, according to Article 24 of the Constitution of Georgia:

"Every citizen of Georgia who has attained the age of 18 shall have the right to participate in referendum or elections of state and self-government bodies".

This constitutional provision, with reference to category of age, establishes an internal restriction – the right to participate in the elections is not a constitutional right of persons under the age of 18 – such a legal field does not exist at all. The second paragraph of Article 16 of the Constitution of Georgia, which makes the following reservation regarding the restriction of freedom of religion, belief and conscience, can be used as illustrations of external restriction:

10 *See* Ruling of the Constitutional Court of Georgia N1/3/1284. 11 May, 2018

11 Espinosa M. *Privacy* (pp.972). The Oxford Handbook of Comparative Constitutional Law

12 Stephen, G. (2007). *Limiting Constitutional Rights,*.University of California, Los Angeles

"The exercise of the rights enumerated in the first and second paragraphs of the present Article may be restricted by law on such conditions which are necessary in a democratic society in the interests of ensuring public safety, health and others rights."

In the case under consideration, it is understood that a person has a constitutional right, and interference in it is allowed by imposing external restrictions on the protected area in order to realize legitimate interests.

Imprisonment is a special legal regime that naturally restricts a persons' access to a number of legal benefits, although this "restriction" should be considered not as an "internal", but as an "external" restriction of a persons' right to free development, which requires justification.

In accordance with the abovementioned decision, the Constitutional Court, in fact, imposed an "internal" restriction on the right to free development of a person, and stated that the right to freedom of development of a person deprived of liberty does not include the possibility of establishing communication with the desired person. This reasoning of the court was based on the notion that the appealed norm, in its verbal context, is an entitling norm. I believe that such an approach is formalistic and leaves unanswered the dilemma identified as a case in the first chapter of the paper, when the State first limits the autonomous sphere of negative freedom (in this case the freedom of movement) and then limitedly returns a certain part of this autonomous sphere. In such a case, the norm is formally binding, but at the substantive level, it is restrictive in nature which creates a legitimate basis for the implementation of normative control over it.

I believe that the court should be guided by the following test to determine the substance of a formally entitling norm and to determine the appropriateness of exercising constitutional control over it:

- Is the legal good provided by the formally entitling norm covered by the constitutional provision that does not have a direct link with this good?
- Does the formally entitling norm exclusively regulate the issue of access to legal good considered within it?

Conditionally, if the norm is formulated as follows:

"Citizens of Georgia have the right to own property."

The verbal context of the norm, at first glance, indicates its entitling nature, however, it would be restrictive to a non-citizen of Georgia, if it would have exclusively regulated access to the legal good in it – the right to own real estate. Thus, both of the above two-step test criteria would be met. (1) The right to own real estate is an integral part of the sphere protected by the constitutional right of a non-citizen of Georgia and he does not have access to this right. (2) Access to the legal good is exclusively regulated by the formally entitling norm.

Such a norm is, of course, formally entitling, but in systemic terms, it is restrictive in nature to those who do not have access to the appropriate legal good. It would be logical to conclude that at

such times, the norm has a normative content that does not give a non-citizen of Georgia the right to own real estate. Constitutional control over this type of legal regulation should be considered as an action within the competence of a negative legislator.

A similar problem is found in the ruling of the Constitutional Court of Georgia on July 27, 2018[13]. The plaintiff challenged Article 81^1 of the Civil Procedure Code of Georgia regarding the constitutional right of a fair court, according to which, in the cases provided by the legislation of Georgia, a minor under the age of 14, has the right to address to the court to protect his or her rights and legitimate interests. The plaintiff appealed that the norm restricted the rights of a minor under the age of 14 to appeal to the court and, thus, restricted the right of a minor to a fair trial under the age of 14. The Constitutional Court qualified the appealed norm as entitling, but did not accept the appeal on the following merits:

> "The Constitutional Court cannot read the restrictive rule in the words of the disputed entitling norm, just because the legislature passed Article 81^1 of the Civil Procedure Code without those words, it would have been broader. Thus, the disputed norm, as well as the first sentence of Article 81^1 of the Civil Procedure Code of Georgia, does not limit the first paragraph of Article 42 of the Constitution of Georgia. Consequently, the constitutional claim in the part of the claim for unconstitutional recognition of a disputed norm with respect to the right to a fair trial is unfounded".

For the purposes of this paper, it is irrelevant to consider whether it was appropriate for the plaintiff to appeal not the normative content of the norm, but individual words. However, what deserves attention within the framework of the issue under consideration is the qualification of the appealed norm as an entitling norm by the Constitutional Court without the submission of any systematic arguments. In this case, the court clearly ignores the fact, that interference with the constitutional right can occur not only in a negative way- by excluding and limiting the normative aspects covered by the protected area, but in a positive way as well – by limiting the exhaustive the normative aspects covered by the protected area.

The first paragraph of Article 42 of the current version of the Constitution of Georgia of December 16, 2018 has no internal restrictions:

> "Everyone has the right to a fair trial to protect his rights and freedoms."

This means that any kind of legal barrier to the right to appeal to the court (whether it is based on subjects or age category) constitutes an external restriction and, thus, an interference with the constitutional right. Conditionally, if there was a negative record in the Code of Procedure: "Persons under the age of 14 do not have the right to address the court." – the court would not have qualified the norm presented by such wording as an entitling norm and most likely would have stated the wording as an intervention in the right to a fair trial, while the restriction presented by a positive sentence – "Minors have the right to appeal to the court from the age of 14 (which is substantially

13 Court ruling of Constitutional Court, 27 July, 2018, N2/17/1301

identical to negative restriction) qualified as entitling and from the very beginning, the interference in the sphere protected by the constitutional right was excluded". Because of the fact that the right to appeal to a court falls within the scope of the constitutional right of persons under 14 (in general), and the appealed norm refers exclusively to the access of minors to the mentioned legal good, both of the above two-step test criteria are met – the norm, despite its formally entitling nature, is not entitling in a substantive sense.

The decision of the Constitutional Court of Georgia of December 28, 2017 is also noteworthy. The plaintiff disputed Article 106, part 10 of the Criminal Procedure Code of Georgia, in relation to the right to liberty, which provided for the possibility of filing a motion with the court on the selection of imprisonment as a measure of restraint against the accused in the event of the concealment of accused. In such a case, no later than 48 hours after the arrest of the accused, the magistrate shall be obliged to appear before the judge according to the place of investigation. According the Tbilisi City Court, the guarantee established by the disputed norm applies only to those wanted accused, which were extradited at the pre-trial stage and not at trial. The plaintiff was a person extradited at the trial stage; a person who had not been brought before a court within 48 hours of arrest. He argued that the failure to appear before the court on the expediency of using detention as a measure of restraint for 48 hours unjustifiably restricted the constitutional right to liberty (Habeas Corpus).

In accordance with the Constitutional Court:

> "The appealed norm does not apply to the cases of extradition after the investigation of the accused. However, the non-application of certain norms in the different relations, of course, does not restrict any right. The disputed norm has an entitling effect on the persons to whom it applies."

Like the examples discussed above, the Constitutional Court, in this case as well, without presenting any systematic arguments, based solely on the sentence structure and its verbal context, qualified the norm as entitling, thus precluding interference with the constitutional rights. It is worth noting that, the dogmatic problem of the qualification of the norm as entitling by the Constitutional Court has not been leveled. Judge Lali Papiashvili and Merab Turava presented a different opinion on the issue:

> "The disputed norm in the case under consideration constitutes a regulation of a special nature, within which the plaintiff's legal problem is also addressed, and due to the fact that there is no other legislative norm to regulate this issue more directly, we consider that the implementation of the instructions by the Constitutional Court in the mentioned conditions – to find a norm of a special nature or to apply the general grounds of detention, which in turn, is not in relation with the subject matter of the dispute, and does not have the normative nature by the plaintiff, does not serve the purposes of constitutional justice."
>
> "Based on all of the above, we consider the factors in the case under consideration, on one hand – the lack of a special norm regulating the legal problem and, on the other hand, the

interpretation of the appealed norm by the court in such a way as it is identified in the constitutional claim, indicates the restrictive nature of the mentioned norm"[14].

According to the authors of different opinions, the formally entitling character of the norm is not sufficient to prove that it does not have a restrictive nature, because of the fact that "...there is no legislative norm to regulate this issue more directly,…". However, to the axis of this argument, which is essentially related to the second criterion of the two-step test, the first criteria of the test should be added as well – access to the good regulated by a norm that substantially, should enter within the scope of the constitutional rights.

In order to identify the entitling norm and to delineate a formally and substantially entitling nature and to maintain systematic logic within its constitutional control, its is fundamental

To distinguish between negative and positive liability of the State for the realization of negative, civil/political right on one hand, and positive right on the other hand. The State has a positive obligation to regulate the restriction of the legal sphere confined by negative freedom, imposing various formal or procedural guarantees. However imposing similar guarantees, by itself, does not mean equipping a person with the right. On the contrary, it is a measure taken by the State in the process of restricting the area of rights restricted by negative freedom.

Habea Corpus – the right to freedom, a protected right under Article 13 of the Constitution of Georgia, is essentially linked to the individual's rights protected by negative freedom. The State has a positive obligation to reflect the conditions of restriction of the mentioned right and related procedural guarantees in the legislation. Saying that a measure taken by the State in relation to this type is of an entitling nature is tantamount to proving that the State can create an area protected by negative freedom. This dogmatic problem was not only not overcome, but not even identified in the above practice of the Constitutional Court.

Cases of inconsistency of the Constitutional Court of Georgia with the constitutional control of the formally entitling norm are the cases, when the court has ruled substantially differently cases of restriction of the right to equality with a formally enforceable norm. For example, the Constitutional Court of Georgia, in its decision of July 3, 2018 held that the tax law, which imposed tax benefits on the Georgian Apostolic Autocephalous Orthodox Church, unjustifiably violated the right of religious minorities to equality. Thus, in the present case, the Court has rightly excluded from the norm the normative content which provided for the non-proliferation of tax privileges on religious minorities. Although the norm was formally unjustifiable, it essentially exclusively regulated the issue of imposing tax benefits on specific cases, and thus, even in the area of legal equality, had a restrictive character to specific entities.

Lali Lazarashvili, a citizen of Georgia, opposed the decision of the Constitutional Court of Georgia on November 10, 2017, against the Parliament of Georgia, where the plaintiff argued that the norm, which assigned a certain category of judges to the Supreme Court to be compensated 1200

14 The decision of Constitutional Court, 28 December 2017, III 14-15

GEL as soon as they reach retirement age, was unconstitutional in relation with the right of equality. Despite the fact that this norm exclusively regulated the compensation of judges of the Supreme Court, the court did not satisfy the constitutional claim and noted:

> *"The disputed norm does not have any content, which can be considered as depriving the plaintiff the right to receive compensation. Therefore, the cancellation of any part of the disputed norm/normative content will not lead to the appointment of compensation for the plaintiff."*

If the Constitutional Court was guided by the mentioned standard, the lawsuit would most likely not be satisfied, as the appealed norm was formally entitling and did not in itself preclude the distribution of tax privileges to religious minorities. The inconsistency of the decision from the Constitutional Court in relation to constitutional control leads us to think that the Court did not fully define the dogmatic framework on this issue and in some cases, limited itself to a formal analysis of the verbal context of the norm.

CONCLUSION

Constitutional control requires an in-depth analysis of the nature of the government's power expressed in legal norms. The legal norm expresses the relationship between the individual and the government. This relationship should be in harmony with the dogmatic aspects of the legal system. The default nature of individual freedom (in the negative sense), its primacy, and the secondary, instrumental value of public authority are an integral part of the dogmatic of the legal system. Within the framework of the relationship directed by the government to the restriction of individual freedom, the formalization of a formally normative norm as a substantive normative norm contradicts the systematic logic of law and does not correspond to its fundamental dogmatic characteristics.

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