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# SIGNIFICANCE OF INTERPRETATION OF THE CONSTITUTION FOR COMMON COURTS' AND CONSTITUTIONAL NORM CONTROL

*"The law may be more intelligent, than the lawmaker"<sup>1</sup>*

## ABSTRACT

The essential access to the Constitution and further realization in the common order, is the major mission for any legal system. As one of the means for reaching the mentioned aim are interpretation methods, which must not lose common striving – orienting on the Constitution. In this process, proper interpretation of the Constitution is particularly important, which creates significant basis for factual depicting of the constitutional principles in regular order. It evaluates norm of the law with constitutional measuring, and decides the collision between interpretation methods based on the Constitution.

In the present article, based on the mutual comparison of German and Georgian legal systems, topical issues existing around the respective interpretation of the constitution are discussed: significance of the topic to be discussed is expressed in theoretical, as well as practical viewpoint. Firstly, it is important in terms of systematization, in order to more accurately perceive legal norm and means for its interpretation. Moreover, the admissibility of relevant interpretation of the Constitution for the common court is interesting, as well as its possible intersection points with the constitutional justice.

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<sup>1</sup> G.Radbruch, Rechtsphilosophie, 8. Aufl. 1973, S. 207.

## I. INTRODUCTION

The hierarchy of normative acts indicates that the Constitution creates scale for application of the norm, however speaking only in the narrow hierarchical view and in general, indication to the primacy of constitution, often is not sufficient and requires more precision, in particular for solving difficult legal problem. In any case, standard methods of interpretation of norms cannot be useful, as the logical connection between the constitution and norm may be lost. Therefore, it becomes necessary to introduce interpretation method, the primary aim of which lies on the essential understanding of the Constitution and in particular, indicates to the explanation of norm in accordance with the Constitution.

The research method basically is based on the analysis of German legal doctrine and judicial practice, and its correspondence with the Georgian reality, on the example of certain cases of the Supreme Court and the Constitutional Court. Since nowadays there is no widely developed reasoning on this topic in the Georgian legal area, it is interesting to discuss its compatibility and problematic aspects, in order to create more clarity with regard to this method of interpretation.

## II. ESSENCE OF PROPER INTERPRETATION OF THE CONSTITUTION

As a rule, the judge of common court must use norms of ordinary law, which have relative independence from the Constitution and result in direct binding of the judge.<sup>2</sup> In the methodological perspective, direct access to the Constitution is performed in 2 stages: firstly, the court, as a body using legal norms, according to the principle of legal state, is obliged to take into consideration major approaches of the Constitution within the framework of administrative discretion and interpretation of general civil law clauses.<sup>3</sup> This issue was outlined very well in the decision of Lüth of the Federal Constitutional Court of Germany,<sup>4</sup> which was based on the notion of fundamental rights, as order of the objective value and doctrinal figures developed from this foundation, that entailed direct binding with fundamental rights between private persons and obligation to protect fundamental rights, which caused constitutional law impact and constitutionalizing of normal legal order.

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2 R. Wahl, Der Vorrang der Verfassung und die Selbständigkeit des Gesetzesrechts, NVwZ 1984, S. 401 (406 ff.).

3 A. Voßkuhle, Theorie und Praxis der verfassungskonformen Auslegung von Gesetzen durch Fachgerichte- kritische Bestandsaufnahme und Versuch einer Neubestimmung. AöR, Bd. 125 (2000), S. 180.

4 Compare, BVerfGE 7,1998 (205 ff.).

“The interpretation oriented on the Constitution” creates respective explanation of the Constitution.<sup>5</sup> Interpretation “oriented on fundamental rights” or “Constitution” in general entails obligation to interpret ordinary, subordinate norms, for instance Civil Code, Criminal Code or bylaws, in light of the elementary approaches of basic law.<sup>6</sup> As far as particularly fundamental rights create basis for objective value order, therefore, while interpreting subordinate norms it is necessary to take it into consideration, which causes so called “**radiation effect**”.<sup>7</sup>

With regard to this issue the Constitutional Court has developed interesting position and in relation to paragraph 2 of article 4 of the Constitution (article 7 in old edition) it has stated that: “this is one of the fundamental principle norm, which gives possibility to perceive scale and importance of human rights, determines limits of entire constitution and, in particular, limits of interpretation and application of constitutional rights.”<sup>8</sup>

On the other hand, if formulation of respective regulation, its history of origin, general context, as well as its aim gives possibility for diverse interpretations, the part of which causes controversial outcome with the Constitution, the priority shall be given to “such version” of the norm, which corresponds to the Constitution.<sup>9</sup> Therefore, operation of the Constitution is considered not only as determining, establishing norm, but as controlling norm as well.<sup>10</sup>

Therefore, the objective meaning of fundamental rights particularly is revealed by proper interpretation of the Constitution. The norm established by the legislator often gives possibility to different interpretations, and choice between them must be made based on the compatibility with the Constitution.<sup>11</sup>

Proper interpretation of the Constitution represents the activity developed by the Federal Constitutional Court of Germany. It entails checking alternatives received from classical interpretation of the norm with regard to the Constitution.<sup>12</sup> Such interpretation has played crucial role in the decision of the Federal Constitutional Court of Germany from 7 May 1953,<sup>13</sup> which was related to performing control of norms in accordance with the paragraph 100 of the basic law, when deliberating constitutionality of the 1<sup>st</sup> paragraph of the law on emergency. In the mentioned case the Court state that the law does not contradict with the Constitutional when there is possibility for such

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5 A. Voßkuhle, *Theorie und Praxis der verfassungskonformen Auslegung von Gesetz durch Fachgerichte - kritische Bestandsaufnahme und Versuche einer Neubestimmung*. AöR, Bd. 125 (2000), S. 180.

6 BVerfGE 7, 1998 (204 ff.).

7 C. Gröpl, *Staatsrecht I: Staatsgrundlagen, Staatsorganisation, Verfassungsprozess*, 11. Aufl. 2019, Rn. 216.

8 Decision of the Constitutional Court of Georgia from 28 June 2010 on the case #1/466 “The Public Defender of Georgia v. the Parliament of Georgia”, II, 3.

9 A. Voßkuhle, *Theorie und Praxis der verfassungskonformen Auslegung von Gesetz durch Fachgerichte - kritische Bestandsaufnahme und Versuche einer Neubestimmung*. AöR, Bd. 125 (2000), SS. 180-181.

10 F. Müller, *Juristische Methodik*, 7. Aufl. 1997, S. 90.

11 G. Manssen, *Staatsrecht II, Teil I. Grundlagen § 3. Funktionen der Grundrechte* Rn. 63, beck-eBibliothek.

12 F. Bassier, *Verfassungskonforme Auslegung*, BRJ 02/2016, S. 109.

13 BVerfGE 2, 266 (282).

interpretation, which is compatible with the basic law and the law does not lose the sense after the interpretation.<sup>14</sup>

As R. Tzipelius states, during the relevant interpretation of the Constitution, the most important is not which interpretation is corresponding to the Constitution, but directly its compatibility with the interpretation of the Constitution. The mentioned is caused by the fact that the constitutional scale for measuring law is not fully determined and it also requires interpretation. As far as there might be several alternatives for interpretation and precision, consequently the question evolves, which interpretation of the Constitution has “primacy of precision” of the legal norm.<sup>15</sup>

In the legal science there is an opinion, that the relevant interpretation of the Constitution does not belong to the independent method of interpretation.<sup>16</sup> The reason for this is the factor, that in this case subordinate norms of the Constitution are considered in the scale of the basic law and represent type of systemic interpretation, because, as mentioned above, if in case of interpretation of the norm there is possibility of two or more interpretations, one of which brings us to the relevant outcome of the constitution, and the other to the contradicting outcome, only the interpretation corresponding to the Constitution must be chosen.<sup>17</sup> However, the interpretation which gives possibility to choose between methods of interpretation and suggests perception of constitutional adequacy, must not be irrational, if we name it as a separate method.

### III. THEORETICAL GROUNDS FOR INTERPRETATION CONSISTENT WITH THE CONSTITUTION

It shall be interesting to review grounds for development of mentioned interpretation. In such case it will be reasonable if we search for the interpretation consistent with the Constitution in different methods of interpretation:

#### **Literal meaning of the norm**

The literal meaning of the norm plays important argumentative role in legal debates, however, it cannot be named as development of the interpretation consistent with the Constitution. The for-

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14 H. Spanner, Die Verfassungskonforme Auslegung in der Rechtsprechung des Bundesverfassungsgerichts, AöR, Vol 91, No 4 (1966), S.504.

15 R. Zippelius, Science of Legal Methods, translation of L. Totladze, 2009, 50-51.

16 C. Gröpl, Staatsrecht I: Staatsgrundlagen, Staatsorganisation, Verfassungsprozess, 11. Aufl. 2019, Rn. 215.

17 C. Gröpl, Staatsrecht I: Staatsgrundlagen, Staatsorganisation, Verfassungsprozess, 11. Aufl. 2019, Rn. 215.

mulation of the norm does not indicate to the interpretation consistent to the Constitution, because it is not clear, and in general, the regular existence of versions of unconstitutional interpretation is recognized, which is covered by the language. The issue, that the formulation is consistent with the constitution, represents a normative fiction.<sup>18</sup>

## **Purpose (Telos)**

There is a question whether the interpretation consistent to the Constitution must be considered as part of the teleological interpretation. In this case it is important to differentiate among each other subjective and objective purpose.<sup>19</sup> The first one is oriented on the regulating purpose of the legislator, objective-teleological interpretation finds norm according to the objective purposes of the law.<sup>20</sup>

For the objective-teleological interpretation diverse criteria are elaborated, one of which is named as "principle of comfort interpretation of the Constitution,"<sup>21</sup> because the interpretation is directed to constitutional values<sup>22</sup> and it implements "functions of ethical and pragmatic order existing in the constitutional law."<sup>23</sup> However, according to the contradicting position, this should not be persuasive, as it is true that the legislator can reach some purposes by the norm. But is it possible that law aims at leaving these purposes invariably? The answer shall be negative: the study of the purpose of the law is not less than the assignment of the interpreter, and teleological interpretation does not have hermeneutic value.<sup>24</sup>

Elimination of this position is possible on the example of §70 of the Criminal Procedure Code of Germany (StPO), which relates to the obligation of the witness to make an oath. In the decision of the Federal Constitutional Court of Germany<sup>25</sup> when defining this norm, the question was addressed whether it was possible to refuse making oath without "legal reasoning", for instance, only with religious motives. The court has established that within the framework of interpretation oriented on the Constitution, §70 StPO maybe discussed not only with the grounds listed in stop, but also with the freedom of religion recognized by the Constitution (article 4 of the basic law). This becomes

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18 F. Bassier, *Verfassungskonforme Auslegung*, BRJ 02/2016, S. 110.

19 F. Bassier, *Verfassungskonforme Auslegung*, BRJ 02/2016, S. 110-111.

20 A.Götz, *Die verfassungskonforme Auslegung – zugleich ein Beitrag zu ihrer Stellung im System der juristischen Methodenlehre*, StudZR, 1/2010, SS. 37-38.

21 G. Hassold, *Strukturen der Gesetzesauslegung in FS für Larenz*, 1983, 211 (228).

22 Ibid.

23 A.Götz, *Die verfassungskonforme Auslegung – zugleich ein Beitrag zu ihrer Stellung im System der juristischen Methodenlehre*, StudZR, 1/2010, S. 38.

24 Ibid.

25 BVerfGE 33, 23.

similar to “classical” objective-teleological interpretation and leaves impression that there is no more space for discussing interpretation consistent with the Constitution as a separate method.<sup>26</sup>

The interpretation consistent with the Constitution must not be considered directly under teleological interpretation. Firstly, this must be excluded on the example of subjective-teleological interpretation, as far as it depends on the purpose of legislator, which does not a priori foreshow compatibility with the constitution. As for the objective-teleological interpretation, it partially is similar to interpretation consistent with the Constitution in the context, that the objective purpose may lead to purposes of the Constitution, however similarly there is real possibility that as a result of this interpretation we get unconstitutional outcome, as far as it is bounded by the normative views.<sup>27</sup>

## Systemic interpretation

There is an opinion that the interpretation consistent with the Constitution must be considered in the framework of systemic interpretation.<sup>28</sup> This is based on common (systemic) concept of legal order. The constitution, as basic system establishing particular norms also belongs to this unity. Hence, interpretation consistent with the Constitution serves for such adjustment of the norm, that it would be interpreted methodically. The mentioned classification does not leave without attention the issue that the interpretation consistent with the Constitution functions not only in the framework of **thematic norm**, but most of all in light of the **control norm**, in order to check ordinary legal norm with regard to the Constitution.<sup>29</sup> As a highest point of the hierarchical step of the legal order, systemic interpretation, consistent with the constitution, must be definitely considered when interpreting other norms. From the idea of unity of legal order, the relevant interpretation of the Constitution may derive.<sup>30</sup> The mentioned principle is based on the assumption that reaching fairness through legal order is possible only based on the unified normative values. In this view, the law must establish compatible unity, and discrepancies (collision) must be decided inside this unity.<sup>31</sup> Based on this the principle **Lex superior derogat legi inferiori** (superior law conformsthe subordinate), which at the same time indicates to necessity of interpretation consistent with the Constitution.<sup>32</sup>

However, it must be questioned, whether the hierarchical legal order is sufficient for proper interpretation of the Constitution. The interpretation consistent with the Constitution overall aims to make decision between alternative version of an action, however, the idea of unity of the legal

26 C. Lorenzen, Zur Rechtsnatur und verfassungsrechtlichen Problematik der erfolgsqualifizierten Delikte, Bd. 43, 1981, S. 142.

27 F. Bassier, Verfassungskonforme Auslegung, BRJ 02/2016, S. 111.

28 H.P. Prümm, „Verfassungskonforme Auslegung“ –BVerfGE 35, 263 JuS 1975, S. 299 (303).

29 A.Götz, Die verfassungskonforme Auslegung –zugleich ein Beitrag zu ihrer Stellung im System der juristischen Methodenlehre, StudZR, 1/2010, S. 39.

30 K. Englisch/ T. Würtenberger, Einführung ind das juristische Denken, 1. Aufl. 2010, S. 103.

31 K.F. Röhl/ H.C. Röhl, Allgemeine Rechtslehre. 3. Aufl. 2008, S. 153 ff.

32 F. Bassier, Verfassungskonforme Auslegung, BRJ 02/2016, S. 112.

order is necessary for its creation and, hence, proper interpretation of the Constitution is hard to imagine without this unity.<sup>33</sup>

In the legal literature the interpretation consistent with the Constitution also is determined as “**sui generis**” principle,<sup>34</sup> which is not irrational. As it appeared, the interpretation consistent with the Constitution has very close connection with systemic interpretation and partially, as if it is not reasonable to distinguish them, however, it would be logical to say that it is more solely standing principle, which in any method of interpretation seeks for constitutional striving, in order to ensure their harmonization, demonstrate norm in the Constitutional mirror and suggest **objective perception, whether it corresponds to the supreme law.**

## IV. THE EXTENT OF THE INTERPRETATION CONSISTENT WITH THE CONSTITUTION

It must be underlined that the monopoly of repealing the norm in German and Georgian models is in hands of the Constitutional Court, which is articulated in paragraph 4 of article 60 of the Constitution of Georgia and paragraph 1 of article 100 of the Basic Law of Germany. In this view, it is important to clearly determine border with interpretation consistent with the Constitution, as in the view of competence of the Common Court, as well as during Constitutional norm control, because the role of this interpretation is important for the Constitutional, as well as the Common and, in particular, the Highest (Supreme) Courts.<sup>35</sup>

### IV.1. Admissibility of using interpretation consistent with the Constitution for the Common Court

Article 7 of the law of Georgia “on Common Courts” distinguishes powers of the Common Courts and the Constitutional Court, which lies on the particular institutional subordination. In paragraph 3 of the mentioned article the significance of the Constitutional Submission is stipulated, when the judge considers that the norm related to the case may contradict with the Constitution, and paragraph 4 indicates to the direct application of the Constitution, however with the reservation that the normative act does not coincide with the Constitution and its examination is not in competence

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<sup>33</sup> Ibid.

<sup>34</sup> A.Götz, Die verfassungskonforme Auslegung – zugleich ein Beitrag zu ihrer Stellung im System der juristischen Methodenlehre, StudZR, 1/2010, S.40.

<sup>35</sup> Compare H. Spanner, Die Verfassungskonforme Auslegung in der Rechtsprechung des Bundesverfassungsgerichts, AöR, Vol 91, No 4 (1966), S.503.

of the Constitutional Court. In the entire context of the norm, with the significance of disputable topic, it must be more relevant whether, within the framework of the Constitutional Submission, in any case the judge has an obligation to address the Constitutional Court if he/she has possibility to make interpretation consistent with the Constitution?

In the decision of the Supreme Court of Georgia from 20 June 2019 we find a very interesting position,<sup>36</sup> in which the Cassation court states, that “in the judicial practice it must be ensures to use the norm interpretation consistent with the Constitution, the Common courts are not entitled to improperly interpret the decision of the Constitutional Court. According to article 7.4 of the organic law “on Common Courts”, if the Court deliberating the case decides that the normative act does not comply with the Constitution, the Court renders decision in accordance with the Constitution.”<sup>37</sup> In the named decision we may find several important messages:

- The interpretation consistent with the constitution may be performed by the Common Courts;
- Interpretation done by the Constitutional Court has binding force. For instance, the Supreme Court applied the Constitutional Court with the Constitutional Submission, and by the interpretation consistent with the Constitution, the Constitutional Court has determined that the norm is constitutional, however, only in case of one of the interpretations, not all of them. This will lead to binding common courts by the constitutional essence of the norm interpreted by the Constitutional Court and they will not be able anymore to interpret norm differently, for instance, instead of teleological interpretation, which gives us Constitutional outcome, to use literal interpretation, which brings us to unconstitutional outcome.

However, it is difficult to read from the decision the connection between the paragraphs 3 and 4 of the Article 7 and whether it entails standard occasion of the interpretation consistent with the Constitution. The Cassation Court in the decision from 16 April 2015<sup>38</sup> considers the named paragraphs as alternative composition of the norm, in particular, indicates that according to article 19.2 of the organic law “on the Constitutional Court of Georgia” to suspend the hearing of the case or apply the Constitutional Court with the submission, or in line with article 7.4 of the organic law “on Common Courts” make a decision individually in accordance with the Constitution of Georgia.”

This approach must be incorrect, as application of paragraph 4 comes forward when the Constitutional Court cannot examine constitutionality of the norm physically, hence, the Common Court becomes institutionally operable. In case of paragraph 3, considering the monopoly of the Constitutional Court to repeal the norm, the Common Court cannot discuss constitutionality of the normative act, if there is a doubt of unconstitutionality. Hence, it is impossible to speak about existence of the alternative, because both of them are related to absolutely unidentical legal circumstance. However, at the same time it is noteworthy that normative substance of paragraph 4 of article 7 is

36 We encounter the same opinion in previous decision, see. Decision/Order of the Chamber of Administrative Cases of the Supreme Court of Georgia N BS-776-768 (2k-4ks-15) from 14.07.2016.

37 Decision/Order of the Chamber of Administrative Cases of the Supreme Court of Georgia N BS-857-853 (k-17) from 20.06.2019.

38 Decision/Order of the Chamber of Administrative Cases of the Supreme Court of Georgia N BS-427-422 (k-14) from 16.04.2015.



lacking reality, as far as the Georgian legislation does not leave any normative act out of the constitutional control.

As for the general admissibility of interpretation consistent to the Constitutional by the Common Court, this must not be excluded by the constitutional submission. However, required prerequisite for its application is that at least any of the interpretations must give the outcome consistent with the Constitution, in other case the judge may not be allowed to directly use the Constitutional norm and consider the disputed norm unconstitutional indirectly, because it is clear there is no guarantee that the Constitutional Court would give the same interpretation and it could say on contrary, that the norm is not inconsistent with the Constitution. According to the judicial practice of the Federal Constitutional Court existing in Germany and dominating study, when interpreting ordinary law, the court is obliged to use interpretation consistent with the Constitution. Therefore, based on the first sentence of paragraph 1 of article 100 of the Basic Law, the submission to the Constitutional Court is inadmissible if there is still possibility of interpretation consistent with the Constitution.<sup>39</sup>

Interpreting the norm in correspondence with the Constitution by the Common Court somehow creates tension with the monopoly of the Constitutional Court to repeal the norm. If in doubtful situation the court anyway uses this interpretation, instead of constitutional submission, the risk of incompetent interference increases. The norm must be repealed by the Constitutional Court not only for the purpose of legal security and integrity, but because of its special expertise and knowledge in rights.<sup>40</sup>

Thus, when interpreting in accordance with the Constitution the Common Court must be particularly cautious, as the judge imposing the law must not transform into lawmaking judge, which violates the principle of separation of power.

## **IV.2. Limits of the constitutional norm control –overview of the practice of the Constitutional Court of Georgia**

The interpretation consistent with the Constitution essentially represents a mission for the Common Courts,<sup>41</sup> however its role is also important during the constitutional legal procedure, as far as such interpretation of the norm is relevant not only within the limits of constitutional submission, when there is a doubt of unconstitutionality, also in general, in case of individual constitutional complaint,<sup>42</sup> when certain problems may emerge, mainly, when passing on the most difficult “roads” of preservation of “operation” and principle of certainty.

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39 C. Burkiczak, §35 Fachgerichtliche Gesetzeskontrolle, in: W. Kluth/ G. Krings, Gesetzgebung: Rechtsetzung durch Parlamente und Verwaltungen sowie ihre gerichtliche Kontrolle, 2014, S. 881.

40 J. Reschke, Die verfassungs- und dreistufenteskonforme Auslegung der Schranken des Urheberrechts - zugleich eine Überprüfung § 52 b UrhG, 2010, S. 30.

41 L. Michael, Normenkontrollen – Teil 3: Fragen der Zulässigkeit: Konkrete Normenkontrolle, ZJS 4/2014, S. 359.

42 Compare Decision/Order of the Chamber of Criminal Cases of the Supreme Court of Georgia N 2k-5-I-18 from 28.02.2018: „The Cas-

### IV.2.1. Constitution as the uniform system

The Constitutional Court of Georgia while interpreting norm pays particular attention to system of the Constitution and tries to measure it with uniform scale. The purpose of interpretation is striving towards idea of “living constitution”, which is attainable through complete analysis of content, limits and extent of each right, moreover, they are not considered separately and in general, the interpretation is based on fundamental values and principles of the Constitution.<sup>43</sup>

An interesting example of systemic interpretation of the Constitution by the Constitutional Court is in the case “Georgian Young Lawyers’ Association and citizen of Georgia Ekaterine Lomtadze v. the Parliament of Georgia”, in which it is stated:<sup>44</sup> “the fundamental principles of the Constitution stipulate the content of the entire Constitution, at the same time, determine main directions of the development of the State. When deciding particular disputes, the Constitutional Court is obliged to analyze respective Constitutional norm, as well as the disputed norm and evaluate it in the context of fundamental principles of the Constitution, in order to avoid separation of these norms from the order of values envisaged in the entire Constitution. Only in such way the complete interpretation of the norm is reached, which facilitates correct assessment of the constitutionality of particular disputed norm. Principles of democratic and legal state are the most important among constitutional principles. They are basis for almost all constitutional norms, including rest constitutional principles. The constitutional system is entirely based on these principles. Moreover, they oblige the government, to be bound by the constitutional system, which implies, that none of the branches of government has right to act based only on the reasonableness, political necessity or any other motivation. The government must be based upon the Constitution, legislation and law entirely. Only in such way the fair legal order is created, without which it is impossible to establish democratic and legal state.”

The Constitutional Court pays particular attention on principles of legal state and democracy, and their interrelation during determination of the content of fundamental right.<sup>45</sup> We must consider introduction of the principle of limit-to-limit proportionality of the fundamental right as a direct influence of the legal state.<sup>46</sup> The principle of proportionality represents material element of

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sation Court does not stand before the necessity to agree the Constitutional Court, as it does not consider that the law used by the court contradicts with the Constitution. Moreover, to explain to the cassator that the convict himself/herself is not restricted to apply to the Constitutional Court for assessing constitutionality of those norms, which in his/her view violate the rights guaranteed by the Constitution.”

43 K. Eremadze, *Balancing interests in the Democratic Society*, 2013, 9.

44 Decision of the Constitutional Court of Georgia N1/3/407 from 26 December 2007 on the case “Georgian Young Lawyers’ Association and citizen of Georgia – Ekaterine Lomtadze v. the Parliament of Georgia.” II, 1-2.

45 K. Eremadze, *Balancing interests in the Democratic Society*, 2013, 10-11.

46 Decision of the Constitutional Court of Georgia N1/2/384 from 2 July 2007 on the case “citizens of Georgia – David Jimshelishvili, Tariel Gvetadze and Neli Dalalishvili v. the Parliament of Georgia.” II, 19: “Principle of proportionality ... ensures balanced, proportional interrelation between the freedom and its restriction, and prohibits restriction of human rights to the bigger extent than it is necessary in the Democratic society. The principle of proportionality is the constitutional criterion for assessing lawfulness of the restriction of human rights. Because of this it has essential importance for the constitutional control. In the legal state it is regular to expect that interrelation between private and public interests will be fair. The more the state interferes in the human freedom, the more are requirements for justifying the interreference.”

the legal state.<sup>47</sup> It often is referred as prohibition of unproportionate interreference. In the public law area, the principle of proportionality represents constitutional requirement, which derives from essence of fundamental rights and principle of legal state.<sup>48</sup>

Therefore, the interpretation consistent with the Constitution, as a part of systemic interpretation may be considered as a precondition that the Constitution must be perceived entirely and interpretation of the norm must be performed in the Common Court, as well as in the Constitutional Court within these limits. At the same time, it is important to underline that during the systemic interpretation the hierarchy of the normative acts must be taken into consideration, in particular, **it is inadmissible to interpret constitutional norm based on the subordinate norm.**

#### **IV.2.2. Preservation of the norm v. Certainty of the norm**

“The purpose and mission of the Constitutional Court is to interpret constitutional rights in a way that this interpretation is compatible with the purposes of the Constitution, values established by it and with the essence of fundamental rights, which ensures application of right practically, realistically and effectively, and does not exhaust it to theoretical and illusory right.”<sup>49</sup> Hence, the Constitutional Court must interpret the norm in such way that its wholeness is not lost and at the same time the importance of relevant norm of the Constitution is not diminished.

As we already have discussed, interpretation consistent with the Constitution, based on the norm, tries to decide the collision between methods of interpretation, which in total serves for salvation of the norm and aims at its repealing only ultima ratio. However, the question arises where is the limit of preservation the norm and whether it takes place without collateral effects.

The idea of preserving norm is based on – favor legis – which primarily is justified by the existence of interpretation consistent with the Constitution. In this case the main direction grounds on preservation of the norm, instead of repealing it because of the particular collision with the Constitution.<sup>50</sup>

It is interesting, whether comprehensive interpretation of the norm, the part of which contradicts with the Constitution, gives possibility to declare norm unconstitutional, for instance indicating the fact that this norm is not in line with the principle of certainty? The judicial practice of the Constitutional Court of Georgia with regard to the mentioned is different, therefore it will be interesting if we discuss it in more details:

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47 W.Ergbuth/ A. Guckelberger, *Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht und Staatshaftungsrecht*, 9. Aufl. 2018, S. 248. See also. C. Gröpl, *Staatsrecht I: Staatsgrundlagen, Staatsorganisation, Verfassungsprozess*, 11. Aufl. 2019, Rn. 467 .

48 C. Gröpl, *Staatsrecht I: Staatsgrundlagen, Staatsorganisation, Verfassungsprozess*, 11. Aufl. 2019, Rn. 507; BVerfGE61, 126 [134].

49 Decision of the Constitutional Court of Georgia N1/1/477 from 22December 2011 on the case “The Public Defender of Georgia v. the Parliament of Georgia”, II, 11.

50 F. Bassier, *Verfassungskonforme Auslegung*, BRJ 02/2016, S. 112.

The Constitutional Court on the case “Georgian Young Lawyers’ Association and citizen of Georgia Ekaterine Lomtadze v. the Parliament of Georgia”, declared norm unconstitutional with the ground that “as a result of reasonable interpretation with the legal methodology, its one version contradicts with the Constitution,” which violated the requirement of transparency and availability of the norm.<sup>51</sup> As we see, the court relates ambiguity of the norm to possibility of several interpretations, out of which one must be contradicting with the Constitution, this will be the guarantee for unconstitutionality of the entire norm, i.e. unconstitutionality of one of the faithful interpretation, becomes indicator of unconstitutionality of the norm. The mentioned decision is precedential in terms of defining principle of certainty, however still including contradicting provisions. For example, the Court states: “possibility to read norm in a nonuniform manner cannot always be ground for proving its unconstitutionality. Possibility to read the norm with several versions, and even more, existence of practice inconsistent with the Constitution, does not indicate on unconstitutionality of the norm, similarly as existence of correct practice based on the ambiguous norm cannot be an exhaustive argument for proving constitutionality of the norm.”<sup>52</sup> Therefore, in the beginning it is indicated that existence of nonuniform interpretations of the norm does not portend uncertainty, however with this ground declares the norm unconstitutional.

In the same context the Decision from 27 August 2009 on the case “The Public Defender of Georgia v. the Parliament of Georgia” is important, and in this decision it is stated: “the Constitutional Court is limited in assessment of constitutionality of the normative acts, which principally differs from the decision on the problem of legality. If the Constitutional Court of Georgia decides the problem of constitutionality of the normative acts, by higher act consistent with the Constitution and bases the argumentation of compliance with the constitution on the existence of higher norm consistent with the Constitution, he/she practically is not able to fulfill its functions and direct assignment.”<sup>53</sup> This approach, of course, does not exclude interpretation consistent with the Constitution, as this interpretation does not imply that the law must lose the sense after interpretation, but rather there must be at least one interpretation, which is consistent with the Constitution and exactly the interpretation compatible with the Constitution is used based on the hierarchy of normative acts, hence we cannot say that it takes away function from the Constitutional Court.

The attitude of the Constitutional Court with regard to the practice of Common Courts is interesting. During certain period there was an approach established, according to which, evaluation of the issue of practical usage of the norm exceeds the authority of the Constitutional Court. As it is stated in the Decision from 31 May 2006, “we must differ from each other the legal (normative) reality and factual reality resulted after its application. The Constitutional Court is entitled to assess constitutionality only of the provision of disputed norm in the view of the Constitution... But if the real-practical implementation of the norm does not comply with its content, then the source if

51 Decision of the Constitutional Court of Georgia N1/3/407 from 26 December 2007 on the case “Georgian Young Lawyers’ Association and citizen of Georgia – Ekaterine Lomtadze v. the Parliament of Georgia.” II, 30.

52 Ibid. II, 16.

53 Decision of the Constitutional Court of Georgia N1/2/434 from 27 August 2009 on the case “The Public Defender of Georgia v. the Parliament of Georgia”, II-9.

infringement of plaintiffs' rights (the content of the norm) must not be looked for in here, but in its practical implementation. And the Constitutional Court cannot discuss the constitutionality of application of the disputed norm."<sup>54</sup>

The approach of 2007 changes already in the decision of 2011, which was related to the constitutionality of mandatory reserve military service. By the literal interpretation of the disputed norm it was outlined that the military reserve service was obligation for every citizen of Georgia.<sup>55</sup> The court considers this law as neutral law, as far as it establishes general obligation. The law with such content cannot envisage interests of all citizens. Hence, the Court considered that there must not be reservation from imposing general obligation from the state with the motive that this obligation is by itself contradicting with the Constitution.<sup>56</sup> In this case it indicated that the decision cannot affect and put under question the legality and constitutionality of the mandatory military service institute<sup>57</sup> and declared unconstitutional the normative content of the norm, which imposes obligation of reserve military service for those, who refuse the mandatory military service with religious motives.<sup>58</sup> Thus, the Constitutional Court declared the norm unconstitutional in the framework of particular normative content and not entirely unconstitutional.

The modern practice of the Constitutional Court when interpreting the norm, pays particular attention to the practice of using norm by the Common Courts, which was disregarded previously.<sup>59</sup>

In the case "JSC "Liberty Bank" v. the Parliament of Georgia" we read: "when determining content of the disputed norm the Constitutional Court, along with many other factors, takes into consideration the practice of its application. Common Courts, in the framework of their competence make final decision about the normative content of the law, about its practical usage, and therefore, about its implementation. Deriving from the mentioned, the interpretation made by the Common Courts has a big significance for determining real content of the law. The Constitutional Court, as a rule, takes and discusses legislative norm with the normative essence, which was used by the Common Court."<sup>60</sup> However, using the practice established by the Common Court is not made with absolute rule and we encounter such exceptions, such as: **contradiction between interpretations made by same court** or **unreasonableness of the interpretation suggested by the Common Court.**<sup>61</sup>

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54 Decision of the Constitutional Court of Georgia N1/1/357 from 31May 2006 on the case "Citizens of Georgia – Tamaz Kilinava, Nugzar Kandelaki, Manana Nasaridze, Madona Ghibradze and Lali Archvadze v. the Parliament of Georgia." This approach is described in other decisions as well: Order of the Constitutional Court of Georgia N2/1/481 from 22 March 2010 on the case "Citizen of Georgia Nino Burjanadze v. the Parliament of Georgia," II, 10; Order N2/16/404; Order N2/8/448, II-12; Decision N1/1/428,447,459, II-20; Order N1/2/440, II-3)

55 Decision of the Constitutional Court of Georgia N1/1/477 from 22December 2011 on the case "The Public Defender of Georgia v. the Parliament of Georgia", II, 74.

56 Ibid. II, 81.

57 Ibid.

58 Ibid. III, 1.

59 Compare the Decision of the Constitutional Court of Georgia N1/1/357 from 31 May 2006 on the case Citizens of Georgia – Tamaz Kilinava, Nugzar Kandelaki, Manana Nasaridze, Madona Ghibradze and Lali Archvadze v. the Parliament of Georgia.

60 Decision of the Constitutional Court of Georgia N1/2/552 from 4March 2015 on the case ""JSC Liberty Bank" v. the Parliament of Georgia", II-16.

61 Ibid.

In this context the decision of the Constitutional Court on the case “JSC “Silk Road Bank” v. The Parliament of Georgia” is important, in which there was a certain approach regarding the disputed norm, interpretation of article 1488 of the Civil Code, from side of the Supreme Court, however the plaintiff indicated that uniformity of the practice was not a guarantee that in future the interpretation of norm’s content would not change. The Constitutional Court shared the opinion of the plaintiff regarding the unconstitutionality of the norm and stated, that “the final decision on the normative content of the law and on its practical application is made by the Common Courts. Therefore, uniform interpretation and application of the norm by the Supreme Court clearly shows that the disputed norm has the mentioned content. In such conditions the Constitutional Court cannot consider the plaintiff’s argument, according to which the disputed norm also has the normative content suggested by it, which contradicts with the interpretation of the Supreme Court. In general, the norm may change after legislative amendments, however, this may not be used as an argument for declaring non adopted law as unconstitutional. The Constitutional Court assesses constitutionality of the disputed norm with the content, which it has during deliberation of the case.”<sup>62</sup>

On first sight, analogue approach is shared by the Constitutional Court in the resonant case ““Ltd Broadcasting Company Rustavi 2” and “Ltd. Television company Sakartvelo” v. the Parliament of Georgia”, where the legal issue was constitutionality of articles 54 and 55 of the Civil Code.

The plaintiff indicated to the ambiguity of the norm, however based on such standard of certainty, which was not yet used in the judicial practice. In the mentioned case, the court distinguished from each other norms establishing responsibility<sup>63</sup> and general norms. The disputed norms of the Civil Code were perceived as manifestation of the abovementioned, and it was stated that “annulling contract with any ground does not imply determination of the action as an offence or imposing responsibility in any way. In addition, annulment of the contract does not restrict limits of persons free activity. By defining grounds for the annulment of contract the state does not negatively interfere in the autonomy of two people, for leading civil relations according to their will, but it refuses implementation its positive obligations (recognizing and implementing the contract).”<sup>64</sup> At last, the Court has established that “regulating civil relations with general norm cannot indicate on infringement of the principle of certainty. Moreover, general norms represent only tool by which legislator may regulate as completely as possible civil relations and reduce to minimum cases of using analogy

62 Decision of the Constitutional Court of Georgia N2/2/656 from 21July 2017 on the case “JSC “Silk Road Bank” v. the Parliament of Georgia”, II-7.

63 In the practice of the Constitutional Court requirements for predictability are different in relation of various norms. For instance, with regard to the norm establishing responsibility, in the case “Citizens of Georgia – AleksandreBaramidze, LashaTughushi, Vakhtang Khmaladze and Vakhtang Maisaia v. the Parliament of Georgia” it is mentioned that “making decision on the punishment of the activity represents an exclusive power of the legislator. Therefore, it must use this power in a way not to allow institution applying law, create the description of punishable action, based on the judicial practice.” See. Decision of the Constitutional Court of Georgia N2/2/516, 542 from 14May 2013 on the case “Citizens of Georgia – AleksandreBaramidze, LashaTughushi, Vakhtang Khmaladze and Vakhtang Maisaia v. the Parliament of Georgia”, II, 37.

64 Decision of the Plenum of the Constitutional Court of Georgia N3/7/679 from 29December 2017 on the case “Ltd. Broadcasting Company Rustavi 2” and “Ltd. Television Company Sakartvelo” v. the Parliament of Georgia”, II, 40.

of law. The condition that in each particular case the Court will determine the content of the norm, may not be sufficient ground for considering this norm uncertain, and therefore unconstitutional.”<sup>65</sup>

Similar to previous decisions, the Constitutional Court indicates that, in general, it evaluates the disputed norm with the content, which it was given by the Common Courts, except the occasions when the practice is not uniform and definitely there is unreasonable interpretation in place.<sup>66</sup> In given case the Constitutional Court based its decision on the interpretation of the Grand Chamber of the Supreme Court, with the argumentation that “it will be incorrect if any court of Georgia, including the Constitutional Court, considers unreasonable interpretation of the named body.”<sup>67</sup> The mentioned opinion is criticized in the distractive opinion of 4 judges, which does not consider decision of the Grand Chamber a priori the scale for evaluation, as for the purpose of effective constitutional control the new interpretation of the disputed norm by the Supreme Court cannot be sufficient,<sup>68</sup> in particular, when judicial practice with regard to the disputed norm is not uniform.<sup>69</sup> Hence, it may be said that the Constitutional Court, despite the existence of distinctive practice, accentuates interpretation of the Grand Chamber, which may sound conflicting with its opinion itself. However, on the other hand, this must not indicate on the infringement of certainty by all means, which is explained by purpose of existence of general norms in the Civil Law and determination of its content by the Common Court.<sup>70</sup>

Even though, at last the Court indicated that with regard to certainty it uses standard established by the decision of the Constitutional Court N1/3/407 from 26 December 2007 (on the case “Georgian Young Lawyers’ Association and citizen of Georgia - EkaterineLomtadze v. the Parliament of Georgia”), however this must not be perceived as the Court refuses approaches developed after 2007 and goes back to “old”, but rather in this case only guiding provisions of the principle of certainty are taken , as far as there was no necessity in the disputed case for establishing new, special constitutional standard.<sup>71</sup>

Analysis of the practice of the Constitutional Court shows that the ongoing practice of the court is mainly oriented on harmonization of practice of the Common Courts and the Constitutional Court, which must be very important, as two parallel interpretations of the norm must be avoided. Contours of interpretation consistent with the Constitution is expressed in it quite significantly.

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65 Ibid. II, 51. Compare distinguished opinion of members of the Constitutional Court of Georgia – Irinelmerlishvili, Giorgi Kverenchkhiladze, Maia Kopaleishvili and TamazTsubutashvili, II, 13, in which it is indicated that when evaluating constitutionality of the norm, the interreference into the right (intensity) is relevant and not connection of the norm to a certain are of law.

66 Ibid II, 78.

67 Ibid.

68 See. distinguished opinion of members of the Constitutional Court of Georgia – Irine Imerlishvili, Giorgi Kverenchkhiladze, Maia Kopaleishvili and Tamaz Tsubutashvili, on the case “Ltd. Broadcasting Company Rustavi 2” and “Ltd. Television Company Sakartvelo” v. the Parliament of Georgia”, 80.

69 Ibid 81-93.

70 Decision of the Plenum of the Constitutional Court of Georgia N3/7/679 from 29December 2017 on the case “Ltd. Broadcasting Company Rustavi 2” and “Ltd. Television Company Sakartvelo” v. the Parliament of Georgia”, II, 51.

71 Ibid. II, 52.

The issue itself will be presented incorrectly, if we directly confront interpretation consistent with the Constitution and the principle of certainty, as far as the latter is the part of Constitutional order, from which these two “contradicting” interests are deriving.<sup>72</sup> It is inadmissible to interpret the principle of certainty in narrow and contentless manner: certainty of the norm is disrupted when the legal security is demolished, thus if the danger is not concrete, indication only to its abstractedness, which more probably will not be completed, cannot be relevant. This danger is balanced by tying up the constitutional court interpretation from the side of Common Courts<sup>73</sup> and at the same time considering interpretations of the Common Courts by the Constitutional Court with reservation, that this must not become absolute and in exceptional cases, the Constitutional Court must be able to interfere.

It must be underlined that the interpretation consistent with the Constitution is the competence of Common Court and not the Constitutional Court. The judge of the Common Court, as applier of the law, has the Constitution as guide through interpretation methods and in case of possible collision obliges to choose such method of interpretation, which will be compatible with the constitution. As for the Constitutional Court, its role prevails only in terms of certainty and it declares norm uncertain and, therefore, unconstitutional when “all methods of interpretation are tried, but its real content is still uncertain, or the essence is clear, but the scope of application is vague.”<sup>74</sup>

## V. CONCLUSION

Interpretation consistent with the Constitution is necessary for unified and harmonious perception of the legal order. Its theoretical basics show, that on the first sight, the interpretation falling under the systemic interpretation makes important connection between Common Courts and the

72 The principle of certainty is the essential part of the legal state and, therefore, it has a constitutional rank. C. Gröpl, *Staatsrecht I: Staatsgrundlagen, Staatsorganisation, Verfassungsprozess*, 11. Aufl. 2019, Rn. 469-473. Considering principle of certainty in the part of constitutionality of the norm and considering as limit of limit of the fundamental right is the result of systemic interpretation.

According to the practice of the Constitutional Court, “Principle of legal security is an integral part of the principle of legal state. On the one hand, the principle of legal certainty is one of the important elements of legal security. The law must address requirements of legal security and, therefore, of principle of certainty” - Decision of the Plenum of the Constitutional Court of Georgia N3/7/679 from 29 December 2017 on the case “Ltd. Broadcasting Company Rustavi 2” and “Ltd. Television Company Sakartvelo” v. the Parliament of Georgia”, II, 29.

73 Compare also Decision/Order of the Chamber of Criminal Cases of the Supreme Court of Georgia 17.01.2018 case N445ap-17, in which the indication of the Appellate Court is shared on considering interpretation of the Constitutional Court as the scale of evaluation: “The Appellate Chamber pointed at the Decision of the Constitutional Court from 2 July 2007, by which the Constitutional Court has approved constitutionality of confiscating property as a punishment envisaged under article 52 of the Criminal Code, however explained that confiscating subject of crime, gun or any other item used for commitment of crime, is justified only if it is used for the purpose for which it is selected as the most effective mean. For this reason, in each particular case, along with satisfying conditions envisaged under article 52 of the Criminal Code of Georgia, the issue of public necessity must be evaluated correctly. In other case it will be doubtful in terms of reaching public aim, and justifying interference in the right to property.”

74 Decision of the Constitutional Court of Georgia N1/1/428, 447, 459 from 13 May 2009 on the case “The Public Defender of Georgia, citizen of Georgia Elguja Sabauri and citizen of Russian Federation Zviad Mania v. the Parliament of Georgia”, II, 19.



Constitutional Court and overall, tries not to lose logical tie between the law and constitutional norms.

Idea of reservation of the norm is not an end in itself, but is the mean for attaining the aim, in order to adequately analyze legal security and its component part, principle of certainty, and avoid creation disproportionate barrier in the legal area, which may be inflexible for practice. Hence, the modern strive of the Constitutional Court, which shares ideas of interpretation consistent with the Constitution, must be distributed and welcomed, and maybe in future it will become even more complete.