BESARION ZOIDZE
Professor, Iv. Javakhishvili Tbilisi State University.

PROBLEMS WITH THE VERIFICATION OF CONSTITUTIONAL NORMS AND CONSTITUTIONALITY

CONTENT

I. Interpretation of Constitutional norms, as the way of verification of Constitutionalism
II. Procedural control of Constitutional amendments
III. Contextual control of Constitutional norms
  III.1. Constitutional law organic part of Constitution
  III.2. Hierarchical subordination of norms
  III.3. Role of precedents in the verification of Constitutionality of Constitution

I. INTERPRETATION OF CONSTITUTIONAL NORMS AS THE WAY OF VERIFICATION OF CONSTITUTIONALISM

The correction of existing deficiencies in a law through interpretation has been a historically proven method. Interpretations are used wherever there is a subject for further explanation. Rule of law can represent such subject, and discernment of its content is quiet possible. Such content is the one, where certain rules of conduct are given. When the gist of the content is not quite explicit from the subject of explanation; such subject does not make a sense at all. Forasmuch as the substance of the subject is created by its content, such subject must be considered as a nonexistent one. Let us imagine a bargain in which the content is indeterminable. Such bargain is not invalid but nonexistent. Civil Code of Georgia, Article 53 states: bargain does not exist if it is impossible to determine the content of it either from the outward expression or the other circumstances. Therefore, there is a reality of having legal – technical signs, and on account of the above mentioned defect, it cannot be qualified as a legal value.

Legal value is the appraisable bargain, no matter if it is real or invalid. Evaluation of constitutional reality of similar categories would be pointless. However, there are frequent cases in the normative reality, when the content of a norm* is formulated in the ways, that are equally different from one another. Particularly, the real content of this norm has not been determined through interpretation. Consequently, the norm lacks signs of perspicuity, which is the indispensable condition to read it in a simple way. In this case, evaluation of the constitutionality of the norms is feasible, and, if its nature is impossible to be confirmed, then it will be considered unconstitutional.

But, what can be considered existent and non-existent within the standard? When we acknowledge existence of any subject, it means, that we recognize it with those entire feature – dimensions, which makes up the essence (substance) of this subject. This is exceptionally obvious regarding Constitutional values. According to the Constitution of Georgia, Article 21, right to property is recognized and determined as a basic human right. Under our Constitution, if we recognize the universal nature of this right, then the nature of its content and the limits of action must be understood adequately to this nature, notwithstanding the sovereignty of autonomous evaluation. Universal legal framework, which encompasses the right to property, will be obligatory for us as well. Therefore, as it was mentioned above, when we admit this or that virtue[3], as generally accepted, it is implied, we admit determinative conception of its essence.

Regarding the aforesaid, some certain practices were piled up in the Constitutional Court. One of the precedents is related to the interpretation of the content of Article 14, Constitution of Georgia. Old precedents are noticed to be replaced with new ones. The Article will consolidate equality of human beings and impermissibility of discrimination according to different signs. In particular, it is recognized by the Constitution, that all men are born free and equal towards the law, regardless of their race, color, language, national, ethnic and social belongings, origin, property, rank status, or location. The most painful cases of discrimination are foreseen in this Article, which might simply destroy the universally recognized value of equality. In addition, international legal acts, in which the equality of human rights was mentioned for the first time, lay special emphasis on the aforesaid direction of discrimination. It can be said, that Article 14 of the Constitution contains the standards of equality, which historically have been established in interpersonal relations.

We should admit that, with the fundamental cases of discrimination, the case will not be settled; it is obvious with the concept of human equality, provided by the National Convention of Human Rights and Freedom. Article 14 of the Convention is not circumscribed by the traditional cases of discrimination and considers other categories as well. For example, discrimination due to disability, occupational status or military rank[1]. By merging metaphysical and existential dependence on the facts of discrimination, the convention becomes a living legal document, and it does not remain in a frozen position but it is improving and altering with the progress of time and life.

In the Constitutional Court of Georgia, regarding the interpretation of the discrimination order, variability of precedents is noticeable in the direction of a broad explanation, considered by Euro-convention. For

* Due to a quite frequent use of the word "norm" in Georgian text, in English version it is replaced by the words "rule", "order".

1 Giorgi Khubua, comments on the Constitution of Georgia, Publishing House "Meridiani ", – Tbilisi, 2005, Art. 14, pg. 44.

the first time, the Court categorically excluded a broad explanation of Article 14 and circumscribed with the cases of discrimination that were foreseen in it. Young researchers put special emphasis on this issue. According to their observation, until 2008, the practice of the Court was mainly based on the grammatical method of interpretation. However, if the case of the discrimination, mentioned by the complainant, were not the case of discrimination, provided by Article 14, the claim would not be considered for discussion[2]. It is stated in one of the verdicts of the Constitutional Court: There are the signs listed in Article 14, the Constitution of Georgia, according to which discrimination of human beings are inadmissible.

Complainants were not able to substantiate the relation of questionable norms with any cases of discrimination, forbidden under Article 14. Moreover, at the preliminary hearing representatives of complainants mentioned, that none of the listed signs of the discrimination under the Constitution of Georgia, Article 14 can refer to the complainants[3]. As we can see, the Court is very prudent during the interpretation of the constitutional norm and confines itself with the cases of the discrimination, stated in Article 14. If any indications of other signs of discrimination had been in this Article, similarly to Article 14 of the Convention, the court obviously would have evaluated every specific case at the administrative hearing and in this way, to discuss the case essentially, the Court would have made the decision upon the adoption and none adoption of the issue.

The expression "the other sign "– logically makes one think, that the comprehensive listing of discrimination is impossible. Only its tentative listing is feasible as it is actually mentioned in the Constitution of Georgia. With the stated expression regarding evaluation of discrimination, the Convention opens the doors and entrusts the court to ascertain every specific case. Despite, "the other sign" – is not mentioned in the Constitution of Georgia, we can comprehend through the interpretation of the norm that it exists considering the nature of the discrimination as an event.

Discrimination does not represent such antithesis of equality, which will exhaust itself only with some traditional cases. It is impossible for the discrimination with its feature-dimensions to make its own organism only with several defined cases. The approach of so called principle of "Numerus clausus" narrows the values, and accordingly, rejection and negative definition is the discrimination itself. When it is impossible to outline all feasible positive conditions of equality, we should presume that it is impossible for its negative condition to be comprehensive. Recent practice of the Constitutional Court supports the broad interpretation of Article 14 of the Constitution. The Court states: ..." existent listing of signs, provided in this Article, at one point, is comprehensive in terms of grammar, but the aim of the order is far too large-scaled, rather than the prohibition of discrimination according to the existent limited listing. Only narrow grammatical explanation would exhaust Article 14, the Constitution of Georgia and derogate its importance in the constitutional legal area[4]". It is obvious, that the Constitutional Court makes the interpretation of the order through the

[2] Teimuraz Tughushi, Giorgi Burjanadze, Giorgi Mshvenieradze, Giorgi Gotsiridze, Vakhushti Menabde, Human Rights and practice of procedure in the Constitutional Court, judicial practice in 1996-2012, Tbilisi, pg. 37-38.

[3] The decree of the Constitutional Court of Georgia on 18 May, 2007 # 2/1-370,382,390,402,405 on the case: Citizens of Georgia – Zaur Elashvili, Suliko Maisaia, Rusudan Gogia and others and Public Defender of Georgia against the Parliament of Georgia.

[4] The resolution of the Constitutional Court March 31, 2008 N 2/1-392 on the case: "Georgian citizen Shota Beridze and others against The Parliament of Georgia".

method of Hermeneutics for which the purpose of the norm is the point of departure. The purpose of the norm determines the limits of its operation. In either event, the purpose is much broader, than its existent listing. The Court supports the existential attitude, when it states, that determination of scopes to protect the rights of equality, must be performed in every particular case[5]. It is the practical existence of the law. It was one of the more courageous precedents, when the Court appeared as the supporter of broad interpretation of the constitutional norms. Without this new precedent we would have the necessity of making amendments to the Constitution, according to the accumulated practical requirements. With such an approach, we maintain the soundness of the Constitution, as the supreme normative act of normative organism (body). This approach will prevent the Constitution from becoming the object of frequent amendments.

I would like to bring one more precedent, when the court was capable to attain the same aim by the systemic interpretation of the constitutional standards, which was performed on the basis of the above mentioned precedent. In the practice of the constitutional court, the case is verified, when the court, in order to surmount existent deficiencies in the Constitution, exercises indirect complementary methods and calls institutional values in question. In one of the cases, known as the Trade Union case, the court, on the basis of a natural person's claim, determines if the Constitution envisages interference in the property of the Trade Union, as the legal entity. The reason of such action proceeds from the fact, that legal entities, according to the court, were not given the right of suing the constitutional court. The court mentioned in its resolution: "The legal entity does not have the right of applying to the Court and in that case, if the complainants (natural persons – B.Z.) are not found as authorized persons, the right of millions of people remains totally unprotected." As we can see, the legal entity was represented by the natural person. If we made the interpretation of constitutional norms on the basis of the constitutional principles, we would see an absolutely different situation. In particular, the necessity of manipulation disappears, forasmuch as it turns out, that the legal entities have the right of applying to the constitutional court according to the interpretation of earlier section of Article 89, paragraph "v" .The current section states: "Regarding person`s basic rights and freedom, recognized by the second chapter of the Constitution of Georgia, the constitutionality of normative acts is discussed on the basis of an individual suit". According to the earlier section, based on the "citizen's suit" the case was discussed. Forasmuch as, the citizen is not a legal person, therefore, the court had considered that the legal bodies did not have the above-mentioned rights. In point of fact, we would get quite a different outcome, if we used the method of systemic explanation. Provided norm should have been explained with other standards, even with Article 45 of the Constitution. According to this article, "Basic Rights and Freedom, stated in the Constitution, through the consideration of their content, extend to the legal entities as well". When we admit, that the legal body is the bearer of the basic right to property, thus we admit all the means of protection of the right, which is considered regarding legal entities. There is no basic right, which is not protected by the constitutional court. So, legal entities even then, had the right of applying to the constitutional court in spite of the fact that Article 89, paragraph "v" constituted only the cases regarding citizens (then it was altered with the term "person"). Implementation of high-minded purpose by the court was followed by the institutional misunderstanding. Since then, the Court has considered the members of The Trade Union, as co-owners of The Trade Union property; the court inter-mixed the property of the legal body and its members.

[5] The resolution of the Constitutional Court of Georgia, March 18, 2011 N 2/1/473

II. PROCEDURAL CONTROL OF CONSTITUTIONAL AMENDMENTS

Constitutional Justice is less alienated regarding the control of the constitutional Amendments, than the control of material ones. It is stipulated with the perception of the procedural control as a verification of formal circumstances. Particularly, it is checked, whether the procedure for adoption of the constitutional amendments was maintained. The constitutional amendments would be considered unconstitutional, as a result of procedural deficiencies. In this case, the value of amendment cannot be taken into consideration. No matter how valuable it is, it would be still considered unconstitutional and the contrary, no matter how alienated this amendment is from the Constitution, it cannot affect the constitutionality of the amendments. In short, protection of the procedure itself is the subject of procedural control, irrespective of, what represents the object in this procedure. The procedure itself represents the constitutional value with the considered content. This content includes formal requirements set out by the legislation and compliance of these requirements during the adoption with these amendments is mandatory.

There are three approaches in the law regarding procedural control. In the first approach, there is a normative right of procedural control established under the country's Constitution. The Constitution of Turkey is an example of this, and according to Article 148 of the Turkish Constitution, the Constitutional Court is constitutionally conferred with the right of implementation of formal control. The way of judicial control was written so broadly, that it would create some precedents of the amendments of material control. In the second approach, the constitutional courts are not directly granted with the authority by the Constitution, but they are still exercising this power. An example of this method is, the Constitutional Court of the German Federation; additionally the Constitutional Courts of Ukraine, Rumania, Bulgaria and Hungary operate in the same way. In the third approach, the constitutional courts refuse to discuss the constitutionality of constitutional amendments, as the Constitutions of these countries do not contain direct indications regarding this authority; such a position was taken by the Constitutional Court of France[6].

As we can see, certain groups of the constitutional court give the right to themselves to fill up their functional deficiency on the basis of the precedent. At any rate the courts do not dissociate the Constitution, but create the authority through the interpretation of the Constitution. The procedural deficiency is so technical by nature, that it does not require any assessment of norms through the value. It will simplify the access to the court to evaluate it, whether such authority is directly considered in the Constitution. What would occur if the court did not independently interfere in this case? Let us imagine, the constitutional law was adopted by the parliament, so that the rule of the common public hearing or the polling in the legislative authority was not maintained. Would such law become part of the Constitution? It is clear that it cannot and it must be determined by the constitutional court. The part of the Constitution becomes what is compatible and harmonized with the Constitution; in this case, it is the adopted law kept within the procedural requirements. In other words, the adopted law without maintaining forms would be alienated from the formal Constitution. The Constitution, as the Organic Law, is the value in terms of the form and the content. To some extent, the determined form (procedural body) is the determinant of the Constitution of contextual constitutionality

[6] Лех Гарлицкий, Зофия А. Гарлицкая, Неконституционные поправки к конституции: существует ли проблема и найдется ли решение? Сравнительное конституционное обозрение, №1 (98), 2014, gv. 90-91.

As regards the Constitution of Georgia, the Constitutional Court expressed its position in the case "Citizens of Georgia- Irma Inashvili, Davit Tarkhan-Mouravi, Ioseb Manjavidze against the Parliament of Georgia," in the decision, issued February 5, 2013 (N1/1/549). Proceeding from the norms of the Organic Law, the constitutional court actually considers the possibility of procedural control permissible, according to the Constitution of Georgia and "the Constitutional Court of Georgia". In Article 89, which implies functions of the constitutional court, the function of the constitutional court is not directly foreseen regarding the verification of the constitutionality of the constitutional amendments; albeit, subparagraph "z" of the same Article authorizes the constitutional court to implement other authorities implied by the Organic Law. Apparently, from this standpoint, Article 19 of the Organic Law, ("regarding the Constitutional Court", subparagraph "a" of paragraph first), authorizes the Constitutional Court of Georgia to verify adoption, signing, publication and enactment of legislative acts in accordance with the Constitution of Georgia. The Constitution is considered to be the part of the legislative acts. The issues regarding constitutional amendments are adjusted by Article 102 of the Constitution, which regards the revision of the Constitution. Thus, the court may assess the authority, envisaged by the Organic Law regarding the constitutional amendments according to Article 102 of the Constitution. Article 102 in itself represents the foundation to presume the authority, under the Organic Law envisaged in "other authorities" under the Constitution, Article 89.

Hence, the position of the court is quite logical, that it is possible for the constitutional court to "determine how much the rules of enactment of the constitutional law, provided by the Constitution were maintained," which could be the basis for the above mentioned case of the constitutional revision[7]. Herewith, according to the court, it is vague what consequences can be followed in the legislation after the implementation of this authority. We should presume that we would see the results, which are stated during the evaluation of the constitutionality of other legislative acts. According to the Organic Law Article 23, paragraph first, any act recognized as unconstitutional, in the above mentioned cases, will be acknowledged as an invalid law. The fact that the constitutional law becomes part of the Constitution cannot be considered as an obstacle for it. The procedural unconstitutionality undermines the foundation to make it the part of the whole body of the Constitution.

In conclusion, we may say, that the verification of constitutionality of constitutional amendments in Georgian reality may be considered as a normative right of the Constitutional Court, although this approach is not strictly in accordance with the Constitution, it is strengthened by the Organic Law.

III. CONTEXTUAL CONTROL OF CONSTITUTIONAL NORMS

III.1. Constitutional law as the organic part of Constitution

The studies of the procedural control have shown that the constitutional body is not a shelter for alienated norms. Any order with its constitutional capacity becomes part of the Constitution. The Constitution morally, systemically, logically is a cohesive organism, the norms of which have the cause and effect relationship,

[7] Verdict N1/1/549 Constitutional Court of Georgia February 5, 2013 on the case – Citizens of Georgian Irma Inashvili, Davit Tarkhan-Mouravi and Ioseb Manjavidze against the Parliament of Georgia.

despite the functional capacity of these norms. It is obvious, that all standards cannot be in the same connection with each other. In this case, interdependence of the standards is significant within one group. Systemic and organic integrity is the characteristic feature not only for the Constitution, but for the whole legislation. Here as well, legislative amendments become an organic part of the normative acts. There is an autonomous form of the provision of norms. However, the justification of its existence has some grounds inside the system; firstly, when the order qualitatively represents the constitutional value and secondly, by adding it to the Constitution, the united organic system is formed, as the whole value. If this norm is deprived of this feature, then it will result in vitality of the whole body. Thereof, the fact is that, the each standard of the Constitution may be evaluative. What was assessed before entering into force may be evaluated after entering into force as well. However, what can be the standard of the evaluation for the current legislation? This is the Constitution. When the norm of the Constitution is assessed, such standard may be the whole Constitution or any norm of it. To give answers to this question, first, we should answer the other ones.

III.2. Hierarchical subordination of norms

Hierarchical subordination of norms is based on the pure formal aspect, and is the significant guarantee of the harmonious normative order. The Constitution forms the basis of the subordination and the law adopted on this basis "regarding normative acts". The Constitution is on the top of this hierarchy and it is followed by all other normative acts in order of rank. In the establishment of subordination system, apart from the Constitution, contextual point does not play the decisive role. The Constitution represents the high-ranking act not only for the difference in the procedure of adoption, but it also represents the most valuable normative act by its nature, value and concept. Because of these peculiarities, it represents the basis for all normative acts. These circumstances give special significance to the elaboration of the constitutional norms by maintaining some widely acknowledged specific standards.

Recently it has been quite noticeable to make conspicuous contextual elements of formal hierarchical order of the normative acts. It may be called contextual hierarchy, which is not familiar with the normative space. The values of hierarchy are noticed in the space of human rights protection. Let us imagine, National Legislation sets higher standards for human rights protection, than the European Convention of Human Rights. According to Article 6 of the Constitution, it shall have the preferential legal force and lower standards shall be applicable, but it will be reasonable to use the Georgian legislation in this particular case but should be this conception emanated from the Constitution as well? We should presume that Article 7 of the constitution will be the foundation for it. That is, if we admit verification of constitutionality of the Constitution, it must be done through the Constitution. It is a paradox, when the subject and instruments of assessment are the same acts. It would be only possible if we admitted the hierarchy within the Constitution. Regarding this issue, the constitutional court has fixed a negative position. According to the court, "The constitutional court makes accordance of the normative acts with the Constitution as integrity of equally significant norms[8]. This provision is correct, but dubious. Integrity of constitutional norms, it is the whole complex of norms, having autonomous character, which systematically, organically, and axiomatically makes the whole of it.

[8] Verdict N1/1/549 Constitutional Court of Georgia February 5, 2013 on the case – Citizens of Georgian Irma Inashvili, Davit Tarkhan-Mouravi and Ioseb Manjavidze against the Parliament of Georgia.

When we assess constitutionality of any rules, first, we evaluate it with regard to any norms of the Constitution, considering the order, which is the part of the whole organism. As regards the equal legal significance of the constitutional norm, it is maintained as well. However, at the same time, we may read in the Constitution two cases of interrelation between these two norms: First, when there is a collision between the norms; in such case, the issue is settled in favor of one of the norms and there is not an issue regarding their constitutionalism. In the second case, we do not have the relation in the light of collision, but some certain groups of norm create the backbone of the Constitution and separate rules are determined with this norm. These are the norms regarding the basic human rights. General order for the implementation of the basic rights, particularly, Article 7 of the Constitution notes that the state recognizes and protects universally admitted rights and freedoms, as the eternal and supreme human values. During exercising the power, people and state are limited with these rights and freedoms, as with directly living law. In the process of formation, restriction of people and state with the basic rights includes restrictions of legislative will. During the distribution of power, it is impermissible to define competencies so that not to endanger basic rights, no matter it will occur at the level of the current legislation or the Constitutional one. It is more impermissible if there is a contradiction in the Constitution regarding the basic rights. Let us imagine, if there had been a norm in the Constitution, which would forbid a foreigner to purchase an agricultural holding as a property. If it were not considered regarding Article 21, what result would we get according to our recent practice? We would get dependence of the right upon the formal aspect. If the current law forbade this right, this prohibition would be considered unconstitutional and it would occur in reality as well. However, if the prohibition were made by the constitutional norm, then it would not be canceled and it would be considered constitutional i.e. regarding one reality, diametrically opposed motivation would be written. One example would affirm that the foreigner should have had the above mentioned right, while the other example would affirm the contrary. What does it mean? Is the law a form or content? Should the form adjust the law or the law the form? The law does not exist without the form, but the form must be adequate to the content, as it is defined by the content.

No matter what kind of normative act we would bring, its form must be definitely adequate to the norm of the content. Let us analyze a simple example: Purchasing the movable thing is made through the transmission, but immovable – through the registration procedure at the Public Registry. Why is there a difference? It is stipulated by the special contextual implication and value of the immovable property. In short, material content of the relationship is the point of departure in the legal essence and not only its legal part. Hence, according to the mentioned logic, the constitutionality of the norm is quite possible.

The norm is the constitutional order not only because it is the formal part of the Constitution and it is stated in the form of the certain norm. Such approach would be a pure positivism. The Constitution is the system of value. If it is missed in the norm, then its constitutionality becomes suspicious; in this case how can we clarify it?

Basic rights are the natural rights and it is impermissible to overcome them with the legal formalism. Those factors, determining values of the human personality, are the super-constitutional character and obligate the Constitution itself, which represents the positive legal means for their detection. Even if they were not

detected in this way, they would still exist. While there is a human being, as the subject of the law, his /her basic rights will exist with him /her. It shows that these rights do not represent the results of the positive legal order. These legal orders are created for guaranteeing the rights. Let us imagine that we do not have Article 21 in the Constitution, which is related to the protection of the basic property rights. Will the citizen of our country have the stated right? Certainly, they will have, as this right will still exist in the non-positive form. The current legislation will be in the same situation, which will regulate the rule for using this right. Therefore, it is wrong to confer a miraculous role on the formal aspect. Basic human rights are parts of human beings. Therefore, it is related to the personality, subjectivity. This situation makes one think about the priority (rated) situation of basic rights in comparison with the other institutions.

The above-mentioned approach is noticed from the Constitution of both developed and developing countries. The most impressive assessments regarding the basic rights are in the countries, which have still not been able to escape from Soviet influence. For example, in the Constitution of Belarus Article 2, it is mentioned: "the human being, its rights, peculiarities and the guarantees of their realization represent high values and the aims of the society and the state".

According to the Constitution of Russian Federation, Article 17 the natural character of the rights is recognized. However, the following is stated in Article 18:" Basic human rights and freedoms operate directly. They determine the essence, content and utilization of the laws, activities of legislative and executive power and local self-government and they are ensured by justice". Despite their attitude towards these rights, their formal conception is impressive.

It can be stated, that the state and the whole legislation are bound with the basic rights, including the Constitution, as they exist in the non-positive sphere of the legal order. Therefore, it is impossible to cancel (overcome) them by the positive legal order. According to the Constitutional Court of Georgia, it is impermissible for the essence of the basic rights to be overcome by the Constitution[9], as the constitutional system of values is established on "the priorities and respect of the basic rights". Natural character of the basic rights stipulates its different "legal status" condition within the united organism of the Constitution. It implies that the determinant norm of the basic rights is the determinant of the constitutionality of the Constitution. The aim of all the institutions is to serve these basic rights. The basic right obligates all of them, even its owner.

III.3. Role of precedents in the verification of Constitutionality of the Constitution

There is a great role of judicial precedents in the modern court. Development of the law is improbable without judicial activism. It should be stipulated with unprecedented variety of civil life. It is impossible for the positive law to keep up with all those challenges, our society faces. The legislator cannot have the claim to envisage correctly (obviously) all the details and offer such order, which can endure the changes of life. Moreover, it would be impossible in the modern world, full of new surprises. All of these unleashed

[9] Resolution N1/466, 28 June 2010 the Constitutional Court of Georgia on the case – Public Defender of Georgia against the Parliament of Georgia.

the existential approach in the law, which implies the recognition of the autonomous law for the regulation of immensely fractional relationship. The modern law offers integrity of widely fractional and independent (autonomous) consequences.

This approach is the most rational way to reach a fair decision. It is not the rejection of the law, as the phenomenon of having some certain general peculiarities, on the contrary; it is the representation (cognition) of a rigid individual peculiarity of the law, through the general value (mirror). In other words, the law appears in the same situation as each of us does. Each person is an individual, and the more it is considered during his/her evaluation as the member of society, the less he/she would be alienated from the society.

The judicial precedents establish the condition of the law. It is not the way of pure interpretation. The Courts also virtually "create" the new standards in this process, which are not directly represented in the legislation. For example, according to the Civil Code of Georgia, Article 4, the judge does not have the right to refuse the implementation of justice with the motive that "the norm of the court does not exist". The lawmaker considers the positive norm of the law, which could be stated in the separate articles of the Code, but if the norm does not exist, on what basis should be the issue resolved? In this case, the judge applies to the analogy of the court. The analogy of the law implies the utilization of certain norms, according to the fundamental values considered by the Code. In short, we came across with the order, which simultaneously exists and does not exist. The norm may not exist in one form, but it may exist in the second one. The Court investigates the form of none-existence of the order and if it does not exist in any form, then the court should make it itself or refuse the utilization of justice. In this particular case, the standard, which can be considered non-existent, represents the legal framework, which organically surrounds the Civil Code and herewith, it exists beyond its frames, as an independent value strictly in non-positive form. Therefore, while making a decision we should clearly determine above-mentioned norm if it represents the "cloak" of the Code or the "constellation" of values beyond its frames.

The whole aim of my discussion is for the court to be able to break through the positive orbit of the law and to seek for the answers in the metaphysical space, on the question, which are not directly answered by the legislation. If we remain faithful to the concept, that everything which is represented in the legislation is still beyond the legislation and obeys the universal order of values. In such case, if we are able to read in the legislation what remains beyond its frames and what this legislation is bound with (must be bound), then we do not evade this legislation.

Simply, we perceive it in the light of values, which define its nature. The important thing is to give the correct answer to the question, what it is, what it should be like and how much it stimulates us to what we already have. In short, we should be able to see not only outward (requirements of metaphysical commitment), but internal commitments (requirements) as well. In the latter case, hands and legs are more unbound for the judicial activism.

From the position of the functionality, evaluation of the mentioned case depends on what role we give to our court of Justice or to the implementation of the constitutional control. The demarcation line, where the self-creativeness of the court runs through, is the legislative function. The court does not have the right, to

appropriate this function. However, here the question arises; the sterilization of the function occurs if any independent function contains the signs of other functions at certain level. When we talk regarding the distribution of power and dissociate three functions of the power, we should not forget that they are different ramifications of the united power as the united function. Therefore, they are linked to each other by the cause and effect. The role of the court is special in this system. Despite the independence of the functions, their coordination with each other and standing at the same position is not excluded. We affirm, that the constitutional court does not have the right to verify the contextual constitutionality of the constitutional norms, as such function is not considered by the Constitution. If we allowed it to occur through the judicial precedents, what would happen then? According to the constitutional court, it would be "self-vesting of itself with the power to recognize the constitutional norms invalid"[10], violation of the Constitution with the motive of protection, supersession of the legislator by the court[11]. Formally, it really looks like this way and the court broadens its functions. Such approach will decline the role of the court in the constitutional sphere.

The court as a rule remains in the domain of determined power of the Constitution; however it does not follow the constitutional norms blindly. I will bring an old example again, let us say, it is stated in the Constitution of Georgia that the citizen of the foreign country does not have a right to be the owner of an agricultural holding (similarly to the Constitution of Armenia). The complainant demands to verify the constitutionality of this norm regarding Article 21 of the Constitution. By formal approach, the court is not capable to determine this, as it does not have such function. The court will rule it proceeding from the judicial activism, as the constitutional court is the most capable to assess the objective-judicial order of the constitutional values. During the process of decision-making, this order is the point of departure for the court. The constitutional court must be allowed to take this step by the interests for the protection order, which cannot be considered as a creative action. If we did not leave the court the right, regarding the human rights, then the Constitution would resemble only the act dependent on the political will; there would be a possibility for the norms to become incapable and obsolescent for life to become the obstacle for the human rights protection.

Admissibility for the procedural control of the constitutional amendments, which is admitted by the constitutional court, makes one think that their context can be controlled as well. Naturally, protection of certain procedures is a significant basis for legitimacy of the Constitutional norm; on the other hand the material part of the norms is no less even more significant. The procedure is the legitimacy of certain legal virtue nevertheless what this virtue is like itself. We wonder what kind of procedures is maintained to create this or that institution. However, their state of value is more significant. Due to procedural defect stating the norm as unconstitutional, the content slips out from the sphere of assessment. Evaluation of the content should be made by the function, specially conceded to the court. Not many courts have had such function, but this has been established through precedents. In literature the example of the Constitutional Court of Turkey is often brought forward, which independently set the precedents of material control for the norms and it should be considered quite thoroughly.

[10] Verdict N1/1/549 February 5, 2013 the Constitutional Court of Georgia on the case-Citizens of Georgia Irma Inashvili, Davit Tarkhan-Mouravi and Ioseb Manjavidze against the Parliament of Georgia

[11] Qetevan Eremadze, assessment perspectives for the Constitutionality of the Constitutional law. Human rights and supremacy of the Court (collection of Articles), Konstantine Korkelia (editor), Tbilisi, 2013, pg. 72

The question regarding the possibility of procedural control and impossibility of material control will always be asked. Ultimately, practically material content of the norms has a great influence on people and we are interested, can be the norm with its state of value considered as the part of the Constitution in the light of the stated demand. When the judicial function is not foreseen in the legislation and we deal with the legislative defects, the lawmaker must fill this up one again, but let us ask the question like this: Who is more capable to perceive the Constitution as the practical living organism, the legislature or the court? At first glance, we may consider the legislature where constitutional norms are adopted and it is most aware what the aims of these norms. Certainly, the legislator should act based on the principles of the practical rationality and should correctly envisage the conjectural results of the norm. However, as long as the practical utilization of the rule does not happen, full perception for the value of the norm and the determination of its viability is impossible. The court has the closest connection with these processes and it is capable to assess the condition of their operation, after its adoption period. In the practical operation of the standard, its capacity is revealed. After adoption, the norm is capable, but during the operation, we can see what state of capacity it meets with.

The above-mentioned discussion leads us to the conclusion, that the operation of the court, to overcome legislative defects through the precedents, should be recognized as justified. It is important to allow the possibility to control the material content of the norm. If we admit it, then, what can be assumed in the positive legal form to be considered admissible in the form of the precedent? The precedent should not be discussed isolated from the positive law. The court should be pushed towards the precedents by the Constitution. It is the legitimate impulse and after that, the court will be vested with the control of the material content. It is the requirement of the Constitution, which must be satisfied to maintain the soundness of the Constitution. The satisfaction of this requirement is necessary; the action of the court must be satisfied, particularly as the necessity proceeding from the objective order of the value fortified in the Constitution.

From this point of view it is obvious that the court resembles the lawmaker, but does not leave its limits; as we mentioned above, its action which is caused by necessity has the normative ground in general.

Thus, the verification of the constitutionality of the Constitution cannot be excluded from the competence of the constitutional court. Before this function formally is reflected in the Constitution, it can be settled through the precedents in the case of special necessity; especially when the objective-judicial order, determined by the values of the Constitution, may become doubtful. Recently published studies, regarding the presented problem indicates the particular importance of the judicial activism[12].

[12] See the interesting comparative judicial research on the basis of the resolutions made by the Constitutional Court of Georgia; Димитрий Гегенава, Неконституционное конституционное изменение: три определения из практики Конституционного Суда Грузии, Южнокавказский Юридический Журнал, №05/2014, gv. 181-190