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# CONSTITUTIONAL PROCEEDINGS ON THE NULLIFIED OR INVALIDATED DISPUTED ACT

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## ABSTRACT

Human rights protection standards significantly depend upon the institutionally independent body supervising the government through the constitutional review of legal acts. This article reviews the significance of continuation of proceedings on the basis of nullified or invalidated norm, as the court's authority to exercise constitutional justice without procedural barriers. In order to protect human rights, the mentioned mechanism has the preventive purposes, since the Parliament is not allowed to pass the law, which is similar to that of the unconstitutional norm.

In many cases procedure rules aim to reduce the Court's caseload, which is necessary for its effective functioning. However, it is important not to cross the line, beyond which the procedural issues will hamper protection of human rights through constitutional proceedings.

The case when government is left with the leverage for manipulation and the Constitutional Court is deprived of the discretionary power in the process of constitutional justice is more dangerous. In particular, the Parliament and executive authorities still have an opportunity to annul norm until the Constitutional Court admits the claim and by doing so to automatically suspend constitutional proceedings.

The article reviews the standards established in the case law of the Constitutional Court of Georgia, in particular, cases when the proceedings on the nullified or invalidated norm continues. Through comparative analysis we will review the models adopted by various countries regarding the determination of the constitutionality of inactive norms.

## I. CONSTITUTIONAL COURT OF GEORGIA AS A WATCHDOG TO PROTECT CONSTITUTIONAL HUMAN RIGHTS

### I. Constitutional Court of Georgia as a Watchdog to Protect Constitutional Human Rights

The Constitutional Court of Georgia has noted in numerous cases that "Article 7 of the Constitution represents the most important guarantee for the protection of fundamental human rights, according to which "the State shall recognize and protect universally recognized human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the State shall be bound by these rights and freedoms as directly applicable law."<sup>1</sup> Therefore, through Article 7 the Constitution establishes the State's obligation, first to recognize, and second to protect and promote human rights. Recognition of human rights by the State, first of all, implies an obligation to acknowledge them as a virtue concomitant to every human being. On the other hand, protection means that the State shall ensure all the necessary mechanisms in order to guarantee enjoyment of human rights, including the possibility to defend these rights through the court proceedings.<sup>2</sup> Acknowledgement of the obligation to recognize and protect human rights aims to provide all the conditions for enjoyment of these rights. Otherwise, fundamental human rights will

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<sup>1</sup> Judgment of the Constitutional Court of Georgia N 1/466 dated 28 June 2010 on the case of The Public Defender of Georgia v. the Parliament of Georgia.

<sup>2</sup> *ibid.*

be violated, which would undermine the pursuit towards the rule of law.<sup>3</sup> While determining the scope of authority of the Constitutional Court, regard shall be given to its functional role towards protection of human rights and the control of other governmental branches as “the Constitutional Court does not administer justice only to decide on a particular case. The function of the Constitutional Court is to carry out constitutional control and hence, to rule with respect to the legal norms... Accordingly, the Constitutional Court determines, what the public order should be and what the circle of the norms defining the legislative base of the country should be.”<sup>4</sup>

While determining the constitutionality of the normative acts adopted in relation to human rights and freedoms recognized under Chapter II of the Constitution of Georgia, the Constitutional Court of Georgia reviews the invalidated legal acts as well. Such exception was established under Article 13.6 of the Law on Constitutional Proceedings, according to which the Constitutional Court may continue the proceedings, if an impugned act is nullified or invalidated after the case is admitted for consideration on the merits in case it relates to human rights and freedoms recognized under Chapter II of the Constitution. Until 12 February 2002, there was no such record in the Law, which means that at the time of case proceedings, annulling or invalidating of the impugned legal act would definitely result in suspension of the case proceedings in the Constitutional Court. After adoption of the above referred norm, the case law of the Constitutional Court has changed in this regard. Following the legislative amendments, the Constitutional Court started to rule on the nullified or invalidated norm.

When introducing the rule related to the continuation of court proceedings regarding nullified or invalidated legal act, the legislator took into account several factors: (1) the court has an authority to review nullified or invalidated legal act only in case it relates to the human rights and freedoms protected under Chapter II of the Constitution; (2) the normative act will be reviewed only in case it was nullified or invalidated after the constitutional claim is admitted for consideration on the merits; (3) the Constitutional Court does not have any such authority at any other stage of the proceedings; (4) the Constitutional Court’s authority to continue proceedings on nullified or invalidated legal act is discretionary; (5) the Constitutional Court reviews nullified or invalidated legal act only in case it is important for the purpose of ensuring constitutional human rights and freedoms.

While interpreting its authority, the Constitutional Court noted: “the Constitutional Court – considering its function, generally serves two purposes – ensuring the functioning of the government within its constitutional framework and protection of human rights from disproportionate inter-

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<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.*

ference by the authorities. As a result of this process, acknowledgement of an existing norms as invalidated as well as motivating to adopt the new norms aims at ensuring of unconditional compliance with the Constitution, which is a precise demonstration that none of the branches of the government is authorized to establish the rules contrary to the constitutional order”.<sup>5</sup>

## II. What are the Practices of the Constitutional Court of Georgia about the nullified or invalidated norm?

The Constitutional Court practice has considerably evolved in terms of continuation of proceedings towards nullified or invalidated normative act. The Constitutional Court had to terminate the proceedings in case the impugned acts were annulled, since there was no appropriate norm in the legislation regulating such situation. After adoption of Article 13.6 of the Law of Georgia on Constitutional Proceedings, the Constitutional Court interpreted the norm and used it in several cases. Accordingly, there are cases that the court examined regarding invalidated norms. Additionally, the Constitutional Court significantly differentiated amendment to the impugned norm before and after its consideration on the merits.

The first case which relates to invalidation of the norm at the stage of constitutional proceedings, is judgment of the Constitutional Court of Georgia, dated 14 August 1997 Georgian Citizen Iuri Bratslavski v. the President of Georgia.<sup>6</sup> On 1 August 1997 the First Collegium of the Constitutional Court admitted the claim filed by the citizen Iuri Bratslavski for consideration on the merits. Before considering the case on the merits, the respondent claimed at the open case hearing, that the impugned act was amended and since the subject of the dispute was not existing, the Court should have terminated the proceedings. The Constitutional Court terminated proceedings and stated that “the content of the impugned act has been changed and the new edition does not relate to adults. This means that the challenged part of the norm has been abolished, invalidated at the moment of considering the case on merits”.<sup>7</sup>

On 23 June 2008 the Constitutional Court ruled on the case of Georgian Citizen Salome Tsereteli Stevens v. the Parliament of Georgia.<sup>8</sup> In this case, Article 44.5 of the Law on Registration of Civil

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<sup>5</sup> Ibid.

<sup>6</sup> Judgment of the Constitutional Court of Georgia N 1/15/38 dated 14 August 1997 on the case of Georgian Citizen Iuri Bratslavski v. the President of Georgia.

<sup>7</sup> Ibid.

<sup>8</sup> Judgment of the Constitutional Court of Georgia N 2/2/425 dated 23 June 2008 on the case of Georgian Citizen Salome Tsereteli Stevens v. the Parliament of Georgia.

acts was challenged, in particular, the constitutionality of words “ ... and with the approval of the Agency” in relation to Article 36.1 of the Constitution. On 25 October 2007 the First Collegium of the Constitutional Court admitted the case for consideration on merits while the Parliament of Georgia passed amendments to the impugned norm. As a result of these amendments, Article 44.5 of the Law on Registration of Civil Acts was formulated as follows: “registration of marriage with a foreign citizen or a stateless person is conducted in accordance with the Civil Code of Georgia and the rules established by law.” The Constitutional Court stated regarding the formulation of the norm that the new wording of the norm does not require the approval from the Civil Registry Agency for the registration of marriage between Georgian citizen and foreign citizen. Accordingly, the challenged norm was formulated in a way that the impugned wording was excluded. In the said case the Constitutional Court relied upon Article 13.6 of the Law of Georgia on Constitutional Proceedings and continued the proceeding, notwithstanding the fact that the challenged content of the norm was abolished. The Constitutional Court suggested that continuation of case proceedings was important in terms of ensuring the protection of human rights. As a result, in the case *Georgian Citizen Salome Tsereteli-Stevens v. the Parliament of Georgia* the Constitutional Court ruled in favor of the claimant. The judgment of the Constitutional Court was effective from the moment of its public announcement in the court room. However, in the resolution part of the judgment was not stated that the claimed wording had to be abolished, since at the time the ruling was adopted, the wording at issue was already abolished. This precedent clearly shows that the function of the Constitutional Court does not only revolve around the interests of claimant but it is the source of interpretation and placement of the Constitutional principles within the framework of the legal order.

On 4 February 2014 the Constitutional Court ruled on the case of *Georgian Citizens – Levan Asatiani, Irakli Vatcharaze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze v. the Minister of Labor, Health and Social Affairs of Georgia*.<sup>9</sup> After the case was considered on the merits, one of the challenged Orders was invalidated and the other was amended, in which the term “homosexuality” was replaced with “man’s sexual intercourse with man”. The Constitutional Court in this case relied upon Article 13.6 of the Law on Constitutional Proceedings and continued consideration of the case on merits. Despite amendments to the impugned norms, the claimant still challenged the new formulation of the norm. The Constitutional Court stated that according to the Minutes of the Court made on 1 March 2013, the wording of the disputed norms admitted for consideration on merits applies the term “homosexuality”, which relates to the homosexual

<sup>9</sup> Judgment of the Constitutional Court N2/1/536 dated 4 February 2014 on the case of Georgian citizens – Levan Asatiani, Irakli Vatcharaze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze v. the Minister of Labor, Health and Social Affairs of Georgia.

persons. The Constitutional Court further stated that, “according to the arguments provided by the claimants in the claim as well as during the consideration of the case on the merits, “homosexuality”, *inter alia*, applies to persons covered by the new edition of the norm at issue. Therefore, the content of the amended norm is also problematic for them.”<sup>10</sup> Before continuing the discussion on the nullified norm, the Constitutional Court paid attention to the fact that the amendments to the disputed norm were made after the case was admitted for consideration on the merits. According to the claimant, the new edition of the provision still violated the rights ensured under Chapter II of the Constitution.

The Constitutional Court has emphasized in a number of cases, “only the current regulation may induce the risk of violations of human rights guaranteed by the Constitution.”<sup>11</sup> However, invalidation of the challenged provision may not always cause the annulment of the normative content at issue. After the norm is abolished, it may be replaced with such a provision, which fully or partly maintains the challenged normative content.

The Court noted that in case of invalidation of the norm, automatic termination of the case proceedings will result in absolute dependence of the constitutional control on the dynamic process of a lawmaking, which at the end might unreasonably complicate protection of right in the Constitutional Court and create an opportunity for abuse in the lawmaking process. That would adversely affect the effective protection of the rights guaranteed under Chapter II of the Constitution of Georgia. The purpose of Article 13.6 of the Law on Constitutional Proceedings is not to allow the legislator to abuse the process of lawmaking.<sup>12</sup>

The Constitutional Court in its judgment dated 4 February 2014 noted that the new edition of the norm somehow repeats the normative content of the old edition. In addition, the respondent’s explanations show that the legislator’s attitude towards the content of the challenged provision has not changed and the risk to infringe the claimants’ rights on the same grounds still exists.<sup>13</sup> The Constitutional Court is limited by the scope of the dispute and consequently, it could not judge the new editions of the norms established as a result of amendments passed on 8 October 2013.

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<sup>10</sup> Ibid.

<sup>11</sup> Judgment of the Constitutional Court of Georgia N1/494 dated 28 December 2010 on the case of Georgian Citizen Vladimer Vakhania v. the Parliament of Georgia.

<sup>12</sup> Judgment of the Constitutional Court of Georgia N1/1/386 dated 23 December 2008 on the case of Georgian Citizens – Shalva Natelashvili and Giorgi Gugava v. the Georgian National Energy and Water Supply Commission.

<sup>13</sup> Judgment of the Constitutional Court N2/1/536 dated 4 February 2014 on the case of Georgian citizens – Levan Asatiani, Irakli Vatcharaze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze v. the Minister of Labor, Health and Social Affairs of Georgia.

However, discussion on the invalidated edition of the norm challenged by the claimant is the preventive remedy for the protection of his/her rights since according to the paragraphs 4 and 41 to Article 25 of the Organic Law on Constitutional Court it is inadmissible to adopt/issue a legal act that contains the same standards that have been declared unconstitutional by the Constitutional Court. At the same time, if the Constitutional Court determines that a disputed normative act or its part contains the same standards that have already been declared as unconstitutional by the Constitutional Court, it delivers a ruling on the inadmissibility of the case for consideration on the merits as well as recognition of the disputed act or its part as void.

According to the above mentioned, the Constitutional Court found that consideration of the constitutional claim on the merits and ruling thereon is especially important for the protection of claimants' rights and freedoms. Accordingly, the Constitutional Court relied upon Article 13.6 of the Law on Constitutional Proceedings and continued the proceedings in order to determine the constitutionality of the term "homosexuality" existing in the editions of 27 September 2007 and 5 December 2000 of the challenged legal acts. The Constitutional Court satisfied the claim and found that the contested wording of the disputed acts was unconstitutional.<sup>14</sup>

The Constitutional Court produced different legal outcome on the case of Publishing dated 24 June 2014.<sup>15</sup> In this case the disputed norm was amended before the case was admitted for consideration on the merits. It is noteworthy that the amendments were not substantial, since only some words were changed that did not result in improvement of the problematic aspects of the normative content of the disputed legal act.<sup>16</sup>

Pursuant to Article 13.2 of the "Law on Constitutional Proceedings" the withdrawal of a claim, as well as the annulment or invalidation of the challenged act at the time of the hearing, result in the termination of the proceedings in the Constitutional Court, except for the cases provided for by paragraph 6 of this article." Taking into account this provision, the Constitutional Court noted that it should have decided whether after adoption of the Order N129/N of the Minister of Education and Science of Georgia dated 6 September 2013 the impugned norms should be considered invalidated.

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<sup>14</sup> Ibid.

<sup>15</sup> Judgment of the Constitutional Court of Georgia N1/3/559 dated 24 June 2014 on the case of Intelect Publishing LLC, Artanuji Publishing LLC, Diogene Publishing LLC, Logos Press LLC, Bakur Sulakauri Publishing LLC, Triasi Publishing House LLC and the Georgian Citizen Irina Rukhadze v. the Minister of Education and Science of Georgia.

<sup>16</sup> The term "center" was replaced with the term "ministry". In addition, the words "conciliation commission" were replaced with the words "Commission for classification."

The Court noted that pursuant to Article 25.1.c of the Law of Georgia on Normative Acts, A normative act or its part becomes invalid if “a decision that invalidates the normative act is adopted”. In the case at hand, new edition of the disputed norms were adopted. According to the explanations of the Constitutional Court, the disputed norms that existed at the moment of the filing the claim, stopped to operate and were replaced by other effective norms. According to the Constitutional Court new wording of the norms per se mean invalidation of the old norms. Therefore, there is no need for a special reference.

According to Article 13.2 of the Law on Constitutional Proceedings, before admitting the constitutional claim for consideration on merits, in case of recognition/acknowledgment of the challenged norm as nullified or invalidated, the Constitutional Court is not authorized to assess the quality of the amendment made to the disputed act and based on it to decide whether to admit the act recognized as invalidated for consideration on the merits. According to the Constitutional Court, in order to terminate proceedings under Article 13.2, it is sufficient the authorized body to acknowledge it as abolished or invalidated. In addition, the Law on Constitutional Proceedings does not allow consideration of the new edition of the norm without respective lawsuit. The court cannot decide on the constitutionality of the norms which are not referred in the constitutional claim, even if the new norm has a similar content with that of the challenged provision.

In the Publishing’s case, judge Maia Kopaleishvili expressed a separate opinion.<sup>17</sup> The separate opinion argues that there are grounds for consideration of the constitutional claim on the merits even if the norm was amended before examination of the case. The judge believed that the purpose of Article 13.2 of the Law on Constitutional Proceedings when assessing the compliance of the challenged act with the Constitution is to ensure effectiveness and efficiency of the constitutional proceedings. Discussion on nullified or invalidated legal act except otherwise provided by law does not serve the purposes of the constitutional proceedings. Hence, the terms of the disputed norm – “invalidation or annulment should be interpreted in the light of the normative content of the amendments made to the disputed norm.”

According to the judge Maia Kopaleishvili, “for the purposes of constitutional proceedings, disputed act is invalidated or nullified, when it does not exist with the same normative content constitutionality of which was disputed by the claimant. Therefore, all the amendments made to the challenged norm shall not result in termination of the court proceedings and each case should

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<sup>17</sup> Separate opinion of the member of the Constitutional Court of Georgia Maia Kopaleishvili on the judgment of the First Collegium of the Constitutional Court N1/3/559 dated 24 June 2014.



be assessed on individual basis, taking into account whether the norm amended or edited by the authorized subject maintains the same normative content.”

The separate opinion stated that the editorial amendment may result in termination of court proceedings only if it is established that as a result of amendments made to the challenged act the normative content of the act which was disputed by the claimant in the constitutional claim is nullified.<sup>18</sup> If the amended norm has the same effect on the claimant as it had before the amendments were passed, then the Court should judge the constitutionality of the disputed norm, since the validity of the norm is related to its legal impact.

### III. MODELS OF PRELIMINARY CONTROL OF THE INVALIDATED NORM AND ITS LEGITIMACY

The purpose of individual application to the Constitutional Court is to protect and recover the violated rights or to avoid the future alleged violations. The wording in the law regarding discussion on the invalidated norm served the purpose of ensuring an effective protection of human rights in a way that would not give the manipulation mechanism to the State.

According to Austrian lawyer, Hans Kelsen, the norm is valid only when it is consistent with the Constitution and its validity is proved by the way of determining its constitutionality.<sup>19</sup> Kelsen believed that everything the legislative body adopts as legislative act, shall be considered as law. In addition, there is a presumption of constitutionality of the norm, until it is declared unconstitutional.

The reason for validity of the norm shall be the Constitution. It is impossible to say that the invalidated norm is unconstitutional, since such norm is legally nonexistent. Therefore, it is impossible to make any legal statement in relation to it. The norm may be annulled not only through ordinary constitutional procedure, in particular *lex posterior derogat priori* meaning that the new law abolishes the previous one, but also through special procedure set forth by the Constitution.

Discussions related to the constitutionality of the invalidated norm as a preliminary (*ex ante*) control is not unusual for the constitutional models of various countries. Preliminary control of the norm, by its nature is abstract control, which means that the norm is assessed not according to the particular case but generally.<sup>20</sup> Decision adopted as a result of preliminary control is binding.

<sup>18</sup> Ibid.

<sup>19</sup> Kelsen H., *Pure Theory of Law*, Translated by M. Knight, Los Angeles, London, 1967, 271.

<sup>20</sup> Juliane Kokott, Martin Kaspar, “Ensuring Constitutional Efficacy”, in Michel Rosenfeldn, Andras Sajó (eds.), *Comparative Constitutional Law, the Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, pg. 806.

In many cases there are specific claimants foreseen for the preliminary control. For example, the claimant can be the President, the Government, Head of the Parliament and the Members of Parliament. Those are the people who draft legislative proposals and transfer them to the special body to determine their consistency with the constitution.

Article 61 of the French Constitution provides that as a result of the preliminary control the Constitutional Council shall make decision within one month, which at the request of the government can be reduced to eight days. Legal experts believe that in such a short period of time the decision will be shallow.<sup>21</sup> The decision regarding the constitutionality of the norm is made by the Constitutional Council. Except France, the preliminary control of the norm is established in Austria, Bulgaria, Czech Republic, Latvia, Lithuania, Poland, Romania, Slovakia and Spain.

Preliminary control plays an important role in enhancing the constitutional effectiveness. In particular, this means that it is possible to suspend adoption of the unconstitutional act before the particular damage occurs.<sup>22</sup> However, it should also be noted that ex ante control might be a problem for political processes. Often because of this argument, States refuse to introduce preventive control of the norm, since in such case the courts become involved in everyday political debates. This gives rise to the problematic issues in terms of constitutional balance of powers.<sup>23</sup> That is why the US Supreme Court refused to conduct ex ante control when it was requested by George Washington.

The binding nature of the decision made by the Constitutional Council demonstrates its role and function. The Council's decision is mandatory for the political powers. In this case, political powers are not only in their private capacity, since the Constitutional Council supervises their policies. At the same time, we should bear in mind the place of the Constitutional Council in the government. According to the French Constitution the Constitutional Council is not a branch of judiciary and it does not perform the function of the judiciary, but its duty is to assess the con-

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<sup>21</sup> Juliane Kokott, Martin Kaspar, "Ensuring Constitutional Efficacy", in Michel Rosenfeldn, Andras Sajó (eds.), *Comparative Constitutional Law, the Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, pg. 806.

<sup>22</sup> Juliane Kokott, Martin Kaspar, "Ensuring Constitutional Efficacy", in Michel Rosenfeldn, Andras Sajó (eds.), *Comparative Constitutional Law, the Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, pg. 806.

<sup>23</sup> Juliane Kokott, Martin Kaspar, "Ensuring Constitutional Efficacy", in Michel Rosenfeldn, Andras Sajó (eds.), *Comparative Constitutional Law, the Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, p. 807.

stitutionality of the legislative proposal presented by the executive and legislative branches.<sup>24</sup> Consequently, administering constitutional justice is a part of the Constitutional Council's function but at the same time the Council is the body supervising the executive branch until the law takes effect.

Preliminary control of the norm is provided in the legislation of the Republic of Serbia as well. In particular, Article 169 of the Serbian Constitution and Article 66 of the Law on Constitutional Court envisages examination of the norm's constitutionality by the Constitutional Court before its publication. The law adopted and approved by the Secretary of the National Assembly, can be submitted to the Constitutional Court for assessment of its constitutionality before its publication. The Constitutional Court shall notify the President of the Republic of Serbia that the constitutionality assessment procedures of the unpublished law were initiated. The reason for informing the President of the Republic of Serbia is that he/she shall sign and publish the law within 15 days.

Determination of the constitutionality of the law that is passed but still has not taken effect might also be requested by at least 1/3 of the Serbian Parliament. An importance of this mechanism is emphasized in the provision of the Constitution of Serbia, according to which once the constitutionality of the unpublished norm is established it is prohibited to initiate proceedings in the Constitutional Court concerning the same norm, since it was already recognized as constitutional/unconstitutional.

Therefore, countries not only recognize the mechanism of control on the nullified norm but also conduct preventive control on the not-yet-effective norm. Both of the models assess the non-effective norm and serve the purpose of strengthening human rights protection mechanisms. *ex ante* control and continuation of proceedings on invalidated norm have common goals such as minimizing damage when protecting human rights and binding the government with the constitutional principles.

## IV. LEGAL NATURE OF CONSTITUTIONAL NULLIFICATION: COMPARATIVE ANALYSIS

### IV.1 General Overview

Together with the overview of the legal proceedings regarding nullified or invalidated norm it is critical to consider an authority of the Constitutional Court towards the scope of the claim. The court might be constrained to examine invalidated norm but it might be granted a wide discretion towards the scope of the claim. This often becomes the reason for reviewing the new normative act after abolishment of the previous normative act.

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<sup>24</sup> [https://www.constituteproject.org/constitution/France\\_2008?lang=en](https://www.constituteproject.org/constitution/France_2008?lang=en)

Experience of the Constitutional Courts with regard to the scope of the claims is different. In particular, the court is not authorized to go beyond the scope of the claim presented by the claimant in Georgia, Belgium, the Czech Republic, France – within a posteriori control, Hungary, Luxembourg, Montenegro, Poland and Sweden.<sup>25</sup> However, in some countries, the Constitutional Court is allowed to do so and review the constitutionality of the law as a whole, as well as of the normative acts related to the challenged norms. Such a system exists in Algeria, Austria, Belarus, Brazil, Croatia, Estonia, France – in the context of a priori control, Serbia and Slovakia.<sup>26</sup>

Regulation of the procedural matters of the Constitutional Courts is aimed at reducing the case-load of the court in a number of cases. However, considering the regulation of procedural issues and the established practice of the Court the role of Constitutional Court can be assessed as an effective mechanism within the country's constitutional order for the protection of human rights. For example, when there is a public interest, number of Constitutional Courts do not terminate proceedings even if the claimant withdraws the claim. Such regulations show the autonomy of the Constitutional Court and a reflection of effectiveness of its function not only in relation to claimants, but in general in the process of establishing the constitutional standards.

From the standpoint of a smooth operation of the human rights protection mechanisms in Georgia, the issue of legal proceedings with regard to the nullified or invalidated norm has recently become relevant. The topic gradually acquired its relevance and eventually became subject of the dispute in the Constitutional Court. Examples provided above show that a number of the impugned norms within the Constitutional Court are nullified or amended by the Parliament or the executive branch before the case is admitted for consideration on merits.

There is no shared opinion on the issue whether the Constitutional Court should be able to continue proceedings when the challenged norm is declared invalid and ceases to operate.<sup>27</sup> In some countries such as Austria, Czech Republic<sup>28</sup>, Belarus, France, Montenegro<sup>29</sup>, Portugal, Slovakia<sup>30</sup>, Sweden and Ukraine the Constitutional Court terminates proceedings once the challenged norm is nullified. However, in other countries the Constitutional Court continues proceedings on the nullified norm and declares it unconstitutional. Administration of such control is the court's discretion in Liechtenstein and Serbia. Also, continuation of examination of the invalidated norm is limited in specific cases in Poland and in Croatia, where continuation of the proceedings is allowed when such is necessary for the prevention of human rights' violations.

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<sup>25</sup> Report of the Venice Commission on Individual Access to the Constitutional Justice, Strasbourg, 2011, 43.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid, page 40.

<sup>28</sup> Article 67 of the Law of Czech Republic on the Constitutional Court.

<sup>29</sup> Article 65 of the Law of Montenegro on the Constitutional Court.

<sup>30</sup> Slovakia's Constitutional Court has recently developed a new practice, which differs from its previous practice. In particular, the general courts can appeal against the norms, which have been adopted invalid, but are still used in specific cases.

## IV.2 Continuation of the Proceedings on the nullified Norm in Poland, Serbia and Croatia

Report of the Venice Commission notes that unequivocal termination of the legal proceedings on nullified norm would be insufficient measure for the protection of human rights in case of specific constitutional control. The balance between the government branches for the purposes of protection of human rights is effectively achieved when the Constitutional Court's powers are unreasonably limited, and the government is left with room for manipulation. The fact of procedural abolition of the norm shall not be determinant for human rights violations, since State responsibility is not only limited to procedural actions but it is also accountable before the individual who suffered harm as a result of legislation. Experience of a number of countries show the significance of Constitutional Court's wide authority with regard to human rights protection when discussing nullified norm.

Under Article 39.3 of the Polish Law on the Constitutional Tribunal, in case the norm is nullified before the court announces its ruling the Constitutional Tribunal does not terminate proceedings, if it believes that adoption of the judgment is necessary for the protection of human rights and freedoms.<sup>31</sup> Such a regulation sufficiently confers the Constitutional Court with the power to protect human rights from the procedural manipulations by the executive branch. In this respect the discretionary powers of the Constitutional Court of Georgia is restricted by the stage of admitting the claim for consideration on the merits, failing which deprives the Constitutional Court to determine whether there is a violation of human rights by the government.

Serbian Constitutional Court is not also limited by the stage of proceeding. In particular, according to Article 64 of the Law of Serbia on the Constitutional Court, if the challenged norm was invalidated during the court proceedings before adoption of the ruling, the Constitutional Court may continue proceedings and assess the constitutionality of the norm.<sup>32</sup> Despite this, the Constitutional Court of Serbia also reviews the constitutionality of the individual legal acts. While determining an issue of proceeding related to the nullified individual legal act, the Court relies on whether the claimant's legal situation was changed after the challenged act was nullified. The proceedings will continue if the Court finds that after the act was nullified, the disputed issue has not improved for the claimant.

According to the Croatian Law on the Constitutional Court the Constitutional Court is entitled to assess the constitutionality of the invalidated law or its specific provisions prior to filing the claim. Limitation period for the assessment of constitutionality of the invalidated legal act is one year from its announcement as invalidated.<sup>33</sup> In addition, in the course of proceedings in the Consti-

<sup>31</sup> Article 39.3 of the Polish Law on the Constitutional Tribunal  
<http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitutional-tribunal-act/>

<sup>32</sup> Article 64 of the Law of Serbia on the Constitutional Court.  
<http://www.ustavni.sud.rs/page/view/en-GB/237-100030/law-on-the-constitutional-court>

<sup>33</sup> Croatian Law on the Constitutional Court (adopted on 3 May 2002) Article 56.1. <http://www.legislationline.org/documents/action/popup/id/6008>

tutional Court if the challenged act is nullified or amended, the Court continues proceedings and adopts the respective judgment.<sup>34</sup>

According to examples provided above, after the claim is filed the discretionary right to assess the nullified norm is fully within the powers of the Constitutional Court since it is the body administering constitutional judiciary and restricting it by the procedural stages will result in disproportional limitation of the balance between the government branches in the process of human rights' protection. Deliberation about inactive norm is an essential element of State responsibility and accountability. Nonexistence of such a mechanism would be a gross violation of the right to fair trial for the purposes of human rights' protection and would be inconsistent with the constitutional principles. State responsibility should be determined not only through procedurally operating norms but through the effect caused by its legislative activity.

## CONCLUSION

Proceedings on the nullified norm can be considered as one of the important aspects for effective constitutional justice. Positive aspects which are characteristic for examination of the not-yet-effective or later nullified norm, led the States to bring their laws in compliance with the constitutional principles.

The said authority of the Constitutional Court ensures excludes manipulation by the executive branch. Considering Georgian reality, such leverage is not completely removed from the executive government since if the norm is nullified before its consideration on the merits the court cannot continue the proceedings. This leads the representatives of the governmental branches to amend the edition of the norm at any stage of the court proceedings so that the normative content remains the same. Additionally, filing claim regarding the amended wording of the norm unreasonably delays protection of the claimant's rights.

Apart from the control mechanism, the Constitutional Court's rulings on nullified norm creates a precedent and guidelines for the adoption of constitutional normative acts. At the same time, immutability of the ruling of the Constitutional Court is one the important aspects, which is why the constitutionality of the nullified norm should be examined. Dispute on the provision that is already recognized as unconstitutional is not permitted and this binds the legislator and gives it instructions in advance not to adopt such a norm content of which will violate the human rights.

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<sup>34</sup> Ibid, Article 57.1.