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# REVIEW OF JUDICIAL PRACTICE OF THE CONSTITUTIONAL COURT OF GEORGIA IN THE VIEW OF SUSPENSION OF DISPUTED NORM

## ABSTRACT

In recent years the number of cases in which plaintiffs ask for suspension of the disputed norm has grown, and this proves the topicality of the issue. Moreover, based on the judicial practice of the Constitutional Court it is evident that often motions presented with the query to suspend norm are not approved, which in most occasions is the result of incorrect formulation of the request from the plaintiff's side. Hence, the purpose of the article is to analyze the procedure used by the Constitutional Court of Georgia for making decision on the suspension of disputed norm and outline those criteria, which are used by the Court while making such decision.

Based on the systemic and logical analysis of the judicial practice of the Constitutional Court of Georgia, the article gives exhaustive information on the procedure of suspension of disputed norm.

In parallel with demonstrating judicial practice of the Constitutional Court of Georgia, the article criticizes the part of the Georgian legislation according to which it is inadmissible to suspend norm only in relation to the plaintiff.

Information presented in the article is kind of a guideline on applying Constitutional Court of Georgia with the motion on suspension of norm and it is useful for students, as well as for practitioner lawyers.

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## INTRODUCTION

Despite the common purpose – ensuring supremacy of the constitution – world’s constitutional courts significantly differ from one another by competence and the extent of authority. This clearly is demonstrated in the part of authority to implement temporary and preventive measures.

In the constitutional justice there are several forms of temporary measure. For instance, the Constitutional Court of Latvia has the authority to suspend enforcement of the court decision.<sup>1</sup> “In Germany, temporary measure is understood as right of the court to suspend enactment of the law.”<sup>2</sup> “In South Africa, while deciding constitutional matter, the court may make a “Just and Equitable” order, which also includes order of temporary nature.”<sup>3</sup> Similar to the Constitutional Court of Africa, Bosnia and Herzegovina also exercises wide authority.<sup>4</sup>

Constitutional Court of Georgia is entitled to use wide range of temporary and preventive measures. “Acting legislation on constitutional legal proceedings prescribes only one type of preventive measure protecting right – mechanism of suspending norm.”<sup>5</sup>

The institute of suspension of norm “serves for avoiding irreversible outcome for the plaintiff before the final court decision on his/her case.”<sup>6</sup> According to explanation of the Venice Commission, “suspension of disputed act represents necessary continuation of the principle of protecting individuals from irreversible damage.”<sup>7</sup> “Therefore, using this institute in needed time with needed extent, is a necessary and irreplaceable measure for plaintiffs being under danger of infringing their fundamental rights irreversibly.”<sup>8</sup>

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1 See. Article 192 (5) Constitutional Court Law (Latvia), available at: <https://www.satv.tiesa.gov.lv/en/2016/02/04/constitutional-court-law/> (last seen on 18.12.2020)

2 Rodina A., 2013. Essence of temporary measure and problematic issues in the judicial practice of the Constitutional Court of Latvia. *Constitutional Law Review*, N6, p. 118.

3 European Commission for Democracy Through Law (Venice Commission), Study on Individual Access to Constitutional Justice Adopted By the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), On the basis of comments By Mr Gagik Harutyunyan (Member, Armenia) Ms Angelika Nussberger (Substitute Member, Germany) Mr Peter Paczolay (Member, Hungary) available at: [https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD\(2010\)039rev-e](https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e) (last seen on 18.12.2020) p.38.

4 See Article 64, Rules of the Constitutional Court of Bosnia and Herzegovina, available at: <http://www.ccbh.ba/osnovni-akti/pravilasnuda/drugi-dio/?title=poglavlje-ii-odluke-i-drugi-akti-ustavnog-suda> (Last seen on 18.12.2020)

5 Baramishvili T., Matcharashvili L., 2019. Institute of suspension of disputed norm in the Constitutional legal proceedings. *Constitutional Law Review*, edition 1 (2019), p. 91.

6 Coalition for an Independent and Transparent Judiciary. 2016. Application on planned amendments to the laws on Constitutional Court. Available at: <https://transparency.ge/ge/post/general-announcement/gantskhadeba-sakonstitutsio-sasamartlos-shesakheb-kanonebshi-dagegmil-tsvlilebebeze> (last seen on 18.12.2020)

7 European Commission for Democracy Through Law (Venice Commission), Study on Individual Access to Constitutional Justice Adopted By the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), On the basis of comments By Mr Gagik Harutyunyan (Member, Armenia) Ms Angelika Nussberger (Substitute Member, Germany) Mr Peter Paczolay (Member, Hungary) ხელმისაწვდომია: [https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD\(2010\)039rev-e](https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e) (last seen on: 18.12.2020) p.38

8 Baramishvili T., Matcharashvili L., 2019. Institute of suspension of disputed norm in the Constitutional legal proceedings. *Constitutional Law Review*, edition 1 (2019), p. 92.

It must be mentioned, that despite the importance of this institute with regard to the human rights protection, “some countries deriving from legal security reasons, do not allow give possibility to suspend norm.”<sup>9</sup> For instance, “in Czech Republic the constitutional court is entitled to terminate acts having erga omnes effect, however, according to the Law on Constitutional Court, it does not have title to suspend them.”<sup>10</sup> The other fact is also interesting, that “instead of suspending norm in Russia the Constitutional Court may suggest to respective institutions to suspend appealed act.”<sup>11</sup> Authority to suspend norm is particularly rare in countries having diffusional constitutional control.<sup>12</sup> Such approach is not approved by Venice Commission, which “supports suspension of disputed individual or normative act when its operation may cause such irreparable damage, that will be impossible to eradicate after declaring disputed act as unconstitutional.”<sup>13</sup>

Opinion of the Venice Commission is shared by various states. For instance, “Constitutional Court of Albania may, by its own initiative (ex officio), or by parties’ request, issue order on suspension of normative act, when it considers that its operation may damage rights of individuals, or public and state interests.”<sup>14</sup> Similar system operates in such countries as: Austria, Armenia, Belgium, Croatia, Estonia, France, Germany, Israel, Lichtenstein, Poland, Serbia, Spain, Switzerland, Turkey, etc.<sup>15</sup> As already mentioned, Georgia is among these countries. According to paragraph 4 of Article 25 of the organic law of Georgia on “the Constitutional Court”: “if the Constitutional Court considers that operation of the normative act may result in irreparable outcomes for one of the parties, it may suspend the disputed act or its relevant part before the final decision is rendered or for less period.”<sup>16</sup>

9 For instance: Algeria, Andorra, Azerbaijan, Belarus, Bulgaria, Cyprus, Czech Republic, France, Hungary, Latvia, Luxembourg, Moldova, Montenegro, Portugal, Romania, Russia, Sweden, Ukraine, etc. European Commission for Democracy Through Law (Venice Commission), Study on Individual Access to Constitutional Justice Adopted By the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), On the basis of comments By Mr Gagik Harutyunyan (Member, Armenia) Ms Angelika Nussberger (Substitute Member, Germany) Mr Peter Paczolay (Member, Hungary) Available at: [https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD\(2010\)039rev-e](https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e) (last seen on 18.12.2020) p.38.

10 Conference of European Constitutional Courts XIIth Congress, The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts, Report of the Constitutional Court of Czech Republic Available at: <https://www.confueconstco.org/reports/rep-xii/Tsjechie-EN.pdf> (last seen on: 18.12.2020) p.10

11 European Commission for Democracy Through Law (Venice Commission), Study on Individual Access to Constitutional Justice Adopted By the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), On the basis of comments By Mr Gagik Harutyunyan (Member, Armenia) Ms Angelika Nussberger (Substitute Member, Germany) Mr Peter Paczolay (Member, Hungary) Available at: [https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD\(2010\)039rev-e](https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e) (last seen on: 18.12.2020) p.38

12 Ibid. p 38

13 Ibid. p. 39

14 Conference of European Constitutional Courts XIIth Congress, The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts, Report of the Constitutional Court of the Republic of Albania. Available at: <https://www.confueconstco.org/reports/rep-xii/Albanie-EN.pdf> (last seen on: 18.12.2020) p. 5

15 European Commission for Democracy Through Law (Venice Commission), Study on Individual Access to Constitutional Justice Adopted By the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), On the basis of comments By Mr Gagik Harutyunyan (Member, Armenia) Ms Angelika Nussberger (Substitute Member, Germany) Mr Peter Paczolay (Member, Hungary) Available at: [https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD\(2010\)039rev-e](https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e) (last seen on: 18.12.2020) p.38

16 Article 25(4), Organic Law of Georgia on “the Constitutional Court of Georgia”, Parliaments’ gazette, 001, 27/02/1996

Admittance of the institute of suspension of disputed norm by legislator in Georgia must be evaluated positively, however, effective application of this important measure for protection of right mostly depends on the procedure of norm suspension. In this regard, opinion of G. Luashvili is interesting, who considers that there is “very strict, high standard established for suspension of operation of the disputed normative act” in Georgia.<sup>17</sup> Analysis of judicial practice of the Constitutional Court gives evidence that the court applies measure of suspension of the disputed norm only in extreme occasions.<sup>18</sup> Studying the practice gives us possibility to say, that often, along with the strict standards, reason for the refusal of suspension of disputed norm is incorrectly formulated query. Hence, studying procedure of the suspension of disputed norm represents a topical issue of practical importance. That is why this article is an attempt to demonstrate standards established by the Constitutional Court with regard to the suspension of operation of disputed norm, based on the systemic and logical analysis of judicial practice of the Constitutional Court of Georgia, and carry out systematization of the practice.

Based on the analysis of recording notice N3/2/717 from 1 June 2016 of the Constitutional Court of Georgia and general practice it may be said that for making decision on the suspension of operation of disputed norm the court must be assured that in the occasion of suspension of norm the following circumstances are in place cumulatively:

1. There is a danger of irreparable outcome for the party, which may not be eradicated in case of approval of the complaint;
2. The danger of irreparable danger for the party is instantaneous and real;
3. Suspension of operation of the norm may prevent complaining party from irreparable outcome (effectiveness criterion);
4. Suspension of operation of the norm will not cause unjustifiable restriction of interests of thirds parties and/or public.

All these circumstances comprise in themselves various sub criteria. The article aims to analyze these criteria in details.

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<sup>17</sup> Luashvili G., 2018. Standard of the suspension of operation of normative act (according to the judicial practice of the Constitutional Court of Georgia), *Constitutional Law Review* XII, p.28

<sup>18</sup> Decision of the Constitutional Court of Georgia from 24 December 2014 (case N3/2/577) paragraph II-34.

## 1. DANGER OF IRREPARABLE OUTCOME FOR THE PLAINTIFF, AS THE PRECONDITION FOR SUSPENDING OPERATION OF THE DISPUTED NORM

The criterion of irreparable outcome for the plaintiff is fulfilled when: a) one of the parties may face the possible damage caused by suspension of the disputed norm and b) there is a danger of irreparable outcome in place. Let us discuss each of the circumstance.

According to the first sentence of paragraph 5 of article 25 of the law of Georgia on “the Constitutional Court of Georgia”: “if the Constitutional Court considers that operation of the normative act may cause irreparable outcomes for one of the parties, it may suspend operation of the disputed norm or part of it, before making final decision or for less period.” Therefore, on first sight, suspension of norm is admissible only in case if there is direct damage to one of the parties (as a rule, plaintiff) and not the third party, however in-depth analysis of this issue gives possibility to make other conclusions.

First of all, it must be mentioned that when we talk about authority of the constitutional court to suspend the disputed act or part of it, the organic law of Georgia “on the Constitutional Court of Georgia” prescribes general rule for suspension of the disputed norm or its part, which aims to prevent irreparable outcome, despite the type of the dispute and who are the disputing subjects. Hence, authority to suspend the norm is relevant for each power of the Constitutional Court and each subject using this power. Consequently, the author of the motion on suspension of operation of the disputed norm may be a natural person and legal person, as well as public official/institution. For the purposes of suspension of the disputed norm “the damage caused to one of the parties” is defined taking into account which subject and in the scale of which capacity applies to the court with constitutional complaint or submission.

When the Constitutional Court is applied by natural and/or legal persons, which challenge the issue of constitutionality of normative acts in the view of human rights recognized by chapter two of the Constitution, they may require suspension of the norm only in case when their rights are directly endangered. The mentioned principle operates differently in case of public defender, who is entitled to ask for suspension of the disputed norm or its part for protecting rights of others. As for the state institution/public official, for them as for parties the irreparable damage is related to endangering those purposes, protection of which was the motive for applying the constitutional court.

Regarding the abovementioned issue, the Constitutional Court of Georgia in the recording notice N3/6/668 from 12 October 2015 has established: “in the Constitutional Court the party may be a private person (natural or legal), as well as state institutions and public officials. In this case, the purpose of their application to the Court is different. While people apply the Court to protect their rights, state institution are driven by public purpose – facilitate government to function within the framework of the Constitution. Obviously, the possible irreparable outcome for the natural person, caused by the disputed norm, always is connected to the irreversible risks of infringement of his/

her right. However, when court is applied by state institutions or public officials (president, public defender), for them, as for the parties, the danger of irreparable outcome cannot be related to the infringement of their rights, as persons representing state in public law relations, have no personal rights. ... For state institution/public official, as for the party, the irreparable outcome is related to creation of danger to the purpose, protection of which is the motive for possibility to apply the Constitutional Court.<sup>19</sup> Therefore, in such time the quality of competence must be taken into account, in the framework of which parties oppose each other.<sup>20</sup>

Along with proving the possibility to cause damage to one of the parties, the evidence must be presented to the court attesting the irreversibility of damage. According to the practice established by the Constitutional Court, “causing irreversible damage implies a situation when operation of the norm may cause irreversible infringement of right.”<sup>21</sup> Under the legislation of Georgia, decisions of the Constitutional Court do not have retrograde power and their effect does not apply to legal relations emerged in period before the decision was made.<sup>22</sup> Therefore, there is a threat that the person’s right may not be restored even if the Constitutional Court declared the disputed norm unconstitutional. The legislation foresees suspension of the disputed norm exactly in such cases. However, whether the disputed normative act may cause irreparable damage to one of the parties, as well as what is “irreparable damage”, is defined in each individual case based on evaluation of particular circumstances.<sup>23</sup>

It must be mentioned that proving existence of the threat of “irreparable damage” is extremely difficult vis-à-vis criminal law norms, as far as compared to civil and administrative legal proceeding, the legislation foresees possibility to reconsider verdict rendered in the criminal law case if there is a decision of the Constitutional Court, which declared unconstitutional the law applied in this case.<sup>24</sup> Deriving from the abovementioned, in case of approving complaint by the Constitutional Court and declaring the disputed norm unconstitutional, the plaintiff is entitled to require revision of the verdict rendered in his/her regard, including in the part of the used sentence.”<sup>25</sup> This is why the Constitutional Court considered numerous motions on suspension of criminal law norm unjustified and indicated, that the risk of “irreparable damage” is not evidenced.

It must be mentioned that the Constitutional Court made important explanation in the decision N3/2/577 from 24 December 20, by which it established: “in some cases criminal law/criminal procedure norm may cause such irreversible and irreparable damage, that after the Constitutional Court makes decision, declaring the norm unconstitutional loses sense for the plaintiff and it is im-

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19 Recording Notice from 12 October 2015 (case N3/6/668) of the Constitutional Court of Georgia, paragraph II-9-10.

20 Recording Notice from 12 October 2015 (case N3/6/668) of the Constitutional Court of Georgia, paragraph II-8.

21 Recording Notice from 20 May 2008 (case N1/3/452,453) of the Constitutional Court of Georgia, paragraph II-2.

22 Decision of the Constitutional Court of Georgia from 24 December 2014 (case N3/2/577) paragraph II-31-35.

23 Recording Notice from 3 April 2014 (case N2/1/565) of the Constitutional Court of Georgia, paragraph II-12.

24 Decision of the Constitutional Court of Georgia from 24 December 2014 (case N3/2/577) paragraph II-33.

25 Recording Notice from 20 December 2016 (N1/21/701,722,725) of the Constitutional Court of Georgia, paragraph II-29.

possible to restore his/her infringed rights.”<sup>26</sup> The mentioned precedent gives us ground to prove that in some particular cases, considering individual circumstances, proving reality of the danger of “irreparable outcome” may be also successful with regard to criminal law norms.

Separate definition is needed for “irreparable outcome” component in case when there is a continuous infringement of the plaintiff’s right. According to practice of the Constitutional Court, only “the fact that possible infringement of plaintiff’s rights takes place in the period between issuing recording notice by the Constitutional Court and final decision on the case, may not serve as condition evidencing the irreparable outcome. The possible restriction of right, as a rule, exists in all those cases which is admitted by the Constitutional Court for deliberation. Continuous character of restriction of right does not imply that there is an irreparable damage caused by disputed norm. Irreparable damage, existence of which leads to suspension of norm, implies such critical occasions when even in case of declaring the norm unconstitutional, it would be impossible to eradicate negative outcomes caused by the norm.”<sup>27</sup>

When deliberating on the issue of suspending the disputed norm, it must be mentioned that to suspend operation of the norm, in parallel with demonstrating danger of “irreparable outcome”, the Constitutional Court must be provided with sufficient evidence which proves that apart from suspension of the norm there is no other possibility to avoid the damage caused by operation of the norm.

Under other possibilities to prevent damage, for instance alternative means of protection of right are intended. By the recording notice N1/3/452,453 from 20 May 2008 the Constitutional Court refused to suspend the disputed norm because the existence of alternative means for protecting right. In this case the plaintiff disputed rules established by the Election Code by which he/she was to certain extent restricted to fully access the data of video camera. The Court collegium considered that operation of the disputed norm would not cause irreparable outcome and explained: “recording of video camera is not the only mean to receive full information about elections, interested person has many other alternatives for receiving information. It must be noted that the plaintiff himself/herself mentions it as additional and effective mean for observing elections, preventing violations and ensuring reaction thereto. According to the Election Code of Georgia supervisor has several means to observe election process on any stage, get and spread information on the process of elections after the observation. Moreover, according to paragraph 4 of Article 67 of the Election Code of Georgia, the person having right to be in the polling building may unlimitedly conduct photo video shooting. Representatives of media also have right to film. Besides, when deliberating the dispute prescribed under legislation, in case of necessity, the court is not restricted to obtain any part of the video recording. The named factors indicate to the circumstances that the video recording is not an only mechanism, without which it would be impossible getting information of election

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26 Decision of the Constitutional Court of Georgia from 24 December 2014 (case N3/2/577) paragraph II-33.

27 Recording Notice from 29 December 2016 (N2/8/665,683) of the Constitutional Court of Georgia, paragraph II-16.



process or possible violations, or reaction to such violations.<sup>28</sup> Considering the mentioned, the Constitutional Court did not approve plaintiff's motion on suspension of the disputed norm.

Considering all the above mentioned, it must be said that danger of irreparable outcome represents necessary prerequisite for suspension of the disputed norm and when evaluating it, the Constitutional Court takes into account two circumstances:

1. It will be impossible to correct the caused outcome in case of declaring the norm unconstitutional;
2. There is no other effective mechanism to prevent the damage caused by operation of the norm.

## 2. REALITY OF THE DANGER OF INSTANTANEOUS VIOLATION OF RIGHT, AS PRECONDITION FOR SUSPENSION OF THE DISPUTABLE NORM

The judicial practice of the Constitutional Court evidences that when requiring suspension of the disputed norm, the general indication to the fact that there might be "irreparable damage" caused by operation of the norm is not sufficient. For making positive decision on the motion, it is necessary to substantiate reality of danger of "irreparable damage" before court makes decision.

For proving the reality of danger of violation of the right, precise and non-abstract/hypothetical evidence must be presented to the court. In the case "Citizens of Georgia – Nikoloz Tsalughelashvili, Kakhi Tsalughelashvili, Makvala Barbakadze v. the Parliament of Georgia" abstract arguments on possible violation of right became the reason for rejecting query on suspension of the norm, where the court clarified: "while asking for suspension of the disputed norm, the plaintiff is obliged to substantiate the existence of real danger of irreversible violation of his/her rights in predictable future, in circumstances when the disputed norm operates." The argumentation of plaintiff relies on the fact that deliberation of the case in the Constitutional Court may be prolonged significantly and in this period the query of mortgagees may exceed the market value of the subject of the mortgage. In such case, the motion of plaintiffs is based on the abstract assumption, the subjective opinion about the period of discussion of the case and this argument does not demonstrate the risk of irreversible violation of plaintiffs' rights."<sup>29</sup>

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28 Recording Notice from 20 May 2008 (case N1/3/452,453) of the Constitutional Court of Georgia, paragraph II-2.

29 Recording Notice from 23 March 2018 (case N2/3/868) of the Constitutional Court of Georgia, paragraph II-37.



It must be mentioned, that while proving reality of danger, in some cases it may be reasonable that plaintiff indicates on “the existence of insufficient guarantees for avoiding such danger, which would clearly show to the court reality of the danger and would convince in high possibility of such negative outcome.”<sup>30</sup> Based on the analysis of judicial practice of the Constitutional Court of Georgia it is evident that it is desirable to present to the court evidence that clearly demonstrates what type and of what extent the damage maybe caused to the plaintiff. Moreover, if the plaintiff is natural or legal person, it must be indicated in the motion under which article of second chapter of the Constitution the right is protected, which may cause the damage.

When substantiating reality of danger of violating constitutional right, it is obligatory that the party proves that possible damage is irreversible not only in general, but before the Constitutional Court makes a decision. If such risk does not exist, the Constitutional Court does not suspend operation of the disputed norm. The example for this is the recording notice from 1 June 2016 N3/3/763 of the Constitutional Court, as well as recording notice on the case “citizen of Georgia Kakha Kukava v. the Parliament of Georgia”, in which the Constitutional Court of Georgia established: “regarding the motion of the plaintiff on suspension of the disputed norm, the Constitutional Court of Georgia states that before next self-government elections there is a year ahead. Until this period the disputed norms objectively cannot cause any outcome, including negative one, as far as there is no necessity for applying these norms. At the same time, before next elections, considering the terms of Constitutional legal proceedings, the Constitutional Court will make a decision on the mentioned case, which ensures preventing possible violation of right. Hence, the plaintiff’s motion on suspension of the disputed norms before the court decision shall not be approved.”<sup>31</sup>

Therefore, when plaintiff indicated that there is a possibility of violation of right in abstract future, which in terms of time diverges from the assumed date of making final decision by the Constitutional Court, the Constitutional Court a priori rejects the motions on suspension of the disputed norm. However, even in case when violation of the right is assumed in the period before constitutional court renders decision, the party may have to prove that for the prevention of his/her right, immediate reaction from side of the Constitutional Court, and suspension of the disputed norm is needed. The criterion of “necessity of instantaneous suspension” is particularly topical after decision of the Constitutional Court of Georgia N3/5/768,769,790,792 from 26 December 2016. Hence, it is interesting to have overview of this decision and factual circumstances preceding this decision.

With regard to suspension of the disputed norm, the primary edition of the organic law of Georgia on “the Constitutional Court of Georgia” prescribed: “if the Constitutional Court considers that operation of the normative act may cause irreparable outcomes for one of the parties, it can suspend the disputed act before the decision is made.” On 3<sup>rd</sup> June 2016 the organic law on the Constitutional Court was amended and the mentioned paragraph was stipulated as follows: “if the Constitutional Court considers, that operation of the normative act may cause irreparable outcomes

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30 Recording Notice from 24 October 2019 (case N2/13/1348) of the Constitutional Court of Georgia, paragraph II-36.

31 Recording Notice from 4 December 2014 (case N1/5/600) of the Constitutional Court of Georgia, paragraph II-16.

for one of the parties, the issue is transferred for discussion to the plenum of the Constitutional Court, which may, by the decision made on the preliminary session, suspend the disputed act or its respective part before the final decision is made, or for less period...” Therefore, by the mentioned provision it was established that the decision on suspension of the norm is made on the preliminary session.

The above-mentioned provision became subject of deliberation by the Constitutional Court on the main hearing in case N3/5/768/769/790/792. Plaintiffs considered that by the disputed norm the possibility to put motion regarding suspension of the norm and period for making decision was procedurally restricted. The Constitutional Court agreed to the plaintiffs’ position and clarified: “identification of irreparable outcome may be done before the preliminary session, as well as after its conduct. It is completely possible that the factual circumstance that existed on the stage of preliminary session, changes in the period before the final decision is made on the case. ... The right guaranteed by the Constitution of Georgia to apply court, which entails the right to apply to the Constitutional Court as well, must not be illusory, but it must create real possibility to restore person’s right properly and must represent effective mean for protection of right. The plaintiff must have expectation and real possibility to protect his/her rights in the Constitutional Court. The Constitutional Court considers that deriving from the purposes of effective justice, the Constitutional Court must be entitled to suspend the disputed norm, if it considers that its operation may result in irreparable damage for the plaintiff.”<sup>32</sup> Deriving from the all mentioned above, the Constitutional Court declared unconstitutional the words on “preliminary session”. Hence, according to the acting legislation there is no restriction on the period of presenting motion regarding suspension of the disputable norm or its part and parties can ask for suspension of the disputable norm any time before the final decision of the Constitutional Court. Thus, there is no more time barrier with regard to using authority of suspension of the norm, but in parallel the standards for proving reality of irreversible danger increased.

In the existing legal reality, when person has right to apply constitutional court with the query to suspend the norm any time before the final decision is made on the case, the Constitutional Court while deliberating the issue of suspending norm, in first place, evaluates the question of operation of the mentioned mechanism in time.<sup>33</sup> In the decision of 26 December 2016 N3/5/768,769,790,792 the Constitutional Court stated that “the mechanism of suspension of the norm is used for preventing immediate, instantaneous danger. ... The Constitutional Court will not suspend the disputed norm in case if the danger of irreparable outcome is not instantaneous and it is possible to exist in future, before making final decision, in other period, as he/she will still have this possibility later.”<sup>34</sup> On this ground the Constitutional Court of Georgia by Recording notices N1459 and N3/5/1491 rejected suspension of the disputed norm.

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32 Decision of the Constitutional Court of Georgia from 29 December 2016 (case N3/5/768,769,790,792), paragraphs II-132-133

33 Recording Notice from 17 December 2019 (case N3/24/1459) of the Constitutional Court of Georgia, paragraph II-24.

34 Decision of the Constitutional Court of Georgia from 29 December 2016 (case N3/5/768,769,790,792), paragraphs II-154.

Discussion of the judicial practice of the Constitutional Court of Georgia is interesting in the view of the period of suspension of the disputable norm. According to the first sentence of paragraph 5 of article 25 of the acting edition of the organic law on “the Constitutional Court of Georgia”: “if the Constitutional Court of Georgia considers that the operation of normative act may cause irreparable outcomes for one of the party, it may suspend the disputed act or its part for period before the final decision is made or for lesser period.” Therefore, operation of the disputed norm, considering the objective circumstances of the case, may be suspended for particular period of until the final decision is made by the court.

It must be noted, that based on the regulations prescribed by the organic law from 30 May 2013 introducing amendments to the organic law on “the Constitutional Court of Georgia”, the party could require suspension of the disputed normative act before the final decision is made, however, if the Constitutional Court could not render a decision on this particular case with 30 calendar days (or in certain cases in 45 calendar days), the decision made with regard to the suspension of disputed act or its relevant part unconditionally would be repealed on the next day after expiry of this term. This regulation was problematic, as if in case the court would not be able to make final decision on the case within 30 (in particular case 45) days because of the difficulty of the case or any other reason, the decision on suspension of operation of the norm would be revoked even in case there is no objective necessity to suspend it.

This regulation became the subject to discussion by the Constitutional Court in the view of constitutionality in the case “N(N)LE The Human Rights Education and Monitoring Center (EMC) and citizen of Georgia Vakhishti Menabde v. the Parliament of Georgia.” In this case the respondent named as a legitimate purpose of the restriction prescribed by the norm the avoidance of long-term “legislative vacuum” caused by suspension of the disputed act and protection of interests of third parties. The court shared defendant’s position about the fact that for reaching the named legitimate purpose it is admissible restriction of constitutional right, however, because of infringement of the proportionality principle it declared the mentioned regulation unconstitutional and explained: “the challenged norm prescribes general restriction, which covers all cases of suspension of disputed act by the Constitutional Court and defines unconditional restoration of all disputed acts after expiry of suspension term. Including the case when suspension of the disputed act does not cause infringement of third persons’ rights or damaging of other important interests.”<sup>35</sup> Suggested mechanism is inflexible and does not give possibility to evaluate, weight in particular case, on the one hand, the interest of plaintiff to avoid irreparable outcomes, irreversible infringement of right and, on the other hand, interests of thirds persons and society, which is protected by the disputed act. The disputed act a priori gives priority to the interests of third persons and does not give possibility to the Constitutional Court to balance opposing interests in particular case.<sup>36</sup>

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35 Decision of the Constitutional Court of Georgia from 24 December 2014 (case N3/2/577), paragraphs II-41.

36 Decision of the Constitutional Court of Georgia from 24 December 2014 (case N3/2/577), paragraphs II-44.

The acting edition of the organic law of Georgia “on the Constitutional Court of Georgia” does not include any more the provision similar to norm declared unconstitutional. Therefore, on the query of the party, in case of the existence of respective objective necessity, the disputed norm or its part may be suspended before the final decision on the case, regardless the time which the court will need for making decision.

It is clear that the acting legislation of Georgia, namely, paragraph 5 of article 25 of the organic law of Georgia “on the Constitutional Court of Georgia” entails grounds, when decision on suspension of the disputed norm may be repealed before the final decision of the Court. However, the acting legislation gives possibility, in case of repeal of the decision on suspension of the norm, to study in details and take into account particular circumstances of the case. Hence, the rough approach of suspension of the norm is not present any more in the acting legislation of Georgia.

### **3. EFFECTIVES OF MECHANISM, AS PREREQUISITE FOR SUSPENSION OF THE DISPUTED NORM**

While discussing issues related to suspension of the disputed norm, the Constitutional Court of Georgia pays attention to the effectiveness of this mechanism. In particular, whether the suspension of norm will impact legal condition of the party in terms of preventing irreparable damage.<sup>37</sup> The ground for suspension of the disputed norm may exist only in case when its suspension changes legal condition of the plaintiff, makes it possible to avoid the damage, which may be caused by operation of the disputed norm. In the judicial practice of the Constitutional Court there are cases in which ineffectiveness of mechanism is indicated as the ground for refusing suspension of the norm. For instance, in the Constitutional complaint N679, plaintiffs indicated that there was a real danger of rendering decision based in the disputed norm on active civil case in the City Court of Tbilisi, which would cause irreparable outcomes for plaintiffs. The Constitutional Court ascertained: “the judicial practice of the Supreme court is noteworthy, according to which, when checking legality of agreements, grounds for their annulment, the legislation existing in time when the agreements were stipulated is used. ... Hence, in line with the established practice, the issue of annulment of the agreement is decided according to norms acting in period of stipulation of this agreement. Deriving from the abovementioned, the Constitutional Court considers that... suspension of the disputed norm will not affect legal condition of plaintiff, he/she may not alter ground for the annulment of the agreement stipulated in 2005 and/or 2006.<sup>38</sup> Consequently, the Constitutional Court did not ap-

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37 Recording Notice from 7 February 2019 (case N2/2/1337) of the Constitutional Court of Georgia, paragraph II-6.

38 Recording Notice from 2 April 2016 (case N1/3/679) of the Constitutional Court of Georgia, paragraph II-5-6.

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prove the query of plaintiff on suspension of the disputed norm. With similar reasoning the plaintiff was refused to suspend the disputed norm in the case “political union “Alliance of Patriots of Georgia” v. the Parliament of Georgia.”

It must be noted explicitly, that proving effectiveness of suspension of the disputed norm is particularly difficult in cases where the negative outcome is already in place. This is determined by the fact that suspension of the disputed norm, comparing to its declaration as unconstitutional, does not define its unconstitutional content.<sup>39</sup> Therefore, suspension of the disputed norm, as a rule, is not considered as ground for reviewing already rendered decision. On the other hand, in complaints of such type, proving the component of “irreparable damage” is complicated, as far as, with high probability, if suspension of the norm gives possibility to restore already infringed right, similar outcome will come also later, in case of declaring the norm unconstitutional. Thus, it may be stated that, when before starting discussion of the motion on suspension of the disputed norm, the right of plaintiff is already infringed and the outcome is in place, the practical chance, that the Constitutional Court will suspend operation of the disputed norm, is very low. For example, in the Recording notice of the Constitutional Court N1/5/535 from 14 December 2012 it is stated: “from the presented complaint and attached material it is evident that, based on the disputed norm, an administrative penalty was already imposed on plaintiff and the court decision was in enforced, thus, the outcome of the disputed norm was already in place. Therefore, there is no ground prescribed by the law for suspension of the disputed norm and plaintiff’s query is unjustified.”<sup>40</sup>

Taking into account all mentioned above, for receiving positive decision on suspension of the disputed norm it is necessary to present to the Court the evidence, which will convince it, that suspension of the norm represents an effective mechanism for protecting the right, that can change factual legal condition and prevent possible violation of the right.

#### 4. NECESSITY TO PROTECT REASONABLE BALANCE BETWEEN INTERESTS, AS PREREQUISITE FOR SUSPENSION OF THE NORM

Generally obligatory rules of conduct prescribed by normative acts are aimed at regulating respective fields of social life and achieving particular legitimate purpose, protecting private and public interests. In certain cases, suspension of the disputed normative act may restrict private, as well as public interests and damage the value, which is protected by this act,<sup>41</sup> that is why, regarding

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39 Recording Notice from 2 April 2016 (case N1/3/679) of the Constitutional Court of Georgia, paragraph II-7.

40 Recording Notice from 14 December 2012 (case N1/5/535) of the Constitutional Court of Georgia, paragraph II-16.

41 Decision of the Constitutional Court of Georgia from 24 December 2014 (case N3/2/577), paragraphs II-20.

the query of plaintiff on suspension of the disputed norm, while making decision on suspension of the disputed norm in every particular case the court must evaluate the danger of infringing others' rights caused by suspension of the norm.<sup>42</sup>

The risk of infringing others' rights and damaging public interests represents an important factor when making decision on suspension of the disputed norm. In the judicial practice of the Constitutional Court, there are several cases when the Constitutional Court considered as an approved the fact that there was a real danger of causing irreparable outcome and infringement of plaintiff's rights in case of refusing suspension of the disputed norm, however, with the motive of protecting others' rights and/or public interests, it refused to suspend the norm. Thus, if there is indication to real danger for damaging rights of other persons or public interests, while making decision on suspension of the disputed norm, it is very important for the Constitutional Court to protect fair balance between these opposing interests.

Deriving from practice of the Constitutional Court, it may be stated that for receiving positive decision on suspension of the disputed norm, the Constitutional Court must be provided with the evidence proving following circumstances:

1. Private interest of plaintiff significantly exceeds interest of third persons, or the public interest, which may be damaged;
2. In case of suspension of the disputed norm there are other regulations, which will decrease to minimum the damage, which may be caused for public interest and rights of other persons.

These two factors were underlined by the Court in case "citizen of Georgia Levan Gvatua v. the Parliament of Georgia".

The plaintiff needed liver transplantation, which was approved by experts' conclusion and relevant documents. According to the legislation, transplantation of organs is permitted only for family members. In the family of plaintiff there was not a person who would be compatible as donor, however a friend could help him, and legislation did not give such possibility.<sup>43</sup> Hence, the plaintiff asked for suspension of the disputed norm before making final decision on constitutionality of this norm.

In the current case, on the one hand the right to live was opposed to the public interest on the other hand. As the respondent explained, suspension of the norm would endanger public security and right of third persons to be protected from trafficking of human organs.<sup>44</sup> Based on the complex analysis of circumstances of the case and legislation of Georgia, the Constitutional Court determined: "the Court considers the argument presented by the defendant related to danger of trafficking of human organs in case of broadening the circle of persons having right to be living donors. At

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42 Recording Notice from 7 November 2012 (case N1/3/509) of the Constitutional Court of Georgia, paragraph II-9.

43 Bardzemishvili T. 2016. "Amendments are expected in the law related to "transplantation of human organs". Article available at: <https://tamtabardzemishvili.wordpress.com/2016/06/21/%E1%83%90%E1%83%93%E1%83%90%E1%83%9B%E1%83%98%E1%83%90%E1%83%9C%E1%83%98%E1%83%A1-%E1%83%9D%E1%83%A0%E1%83%92%E1%83%90%E1%83%9C%E1%83%9D%E1%83%97%E1%83%90%E1%83%92%E1%83%90%E1%83%93%E1%83%90/>" (last visit on 31.09.2020)

44 Recording Notice from 25 November 2015 (case N3/9/682) of the Constitutional Court of Georgia, paragraph I-20.

the same time the Court indicates that suspension of the disputed norm does not cause legalization of trafficking of human organs and acting legislation provides many other mechanisms for preventing trafficking of human organs. ... Suspension of the disputed norm may, indeed, cause danger of trafficking of human organs and require more effort from the state to fight against this danger, but the acting legislation provides other mechanisms to combat the mentioned threat, which must ensure protection of life and health of the donor.<sup>45</sup> On the other hand ... before the final decision is made by the Constitutional Court, operation of the disputed norm may cause irreversible aggravation of the plaintiff's health, including death. The Constitutional Court defines that within the framework of acting legislative regulations suspension of the disputed norm does not create such danger which may cause objective observer to think that public interest of operation of the disputed norm exceeds interest of plaintiff's life and health.<sup>46</sup> Thus, in the this case the Constitutional Court considered that the private interest of plaintiff significantly prevails the public interest and, at the same time, in case of suspension of the disputed norm, the legislation of Georgia provides other mechanisms for protecting public interests. Therefore, the Constitutional Court has approved plaintiff's query and suspended operation of the disputed norm.

While discussing the issue of opposing private and public interests in the view of suspension of the disputed norm, in the judicial practice of the Constitutional Court one fact is noteworthy, that when evaluating quality of possible damage caused by operation of the norm, in case of filing complaint by the natural or legal person based on the second chapter of the Constitution of Georgia, the Constitutional Court considers only the damage, which may be caused directly to the plaintiff. It is interesting that the Judge Irine Imerlishvili has distinguished opinion on this issue. She outlined distinguished opinion on the Recording Notice N1384, that the Court should have evaluated the danger deriving from operation of the norm in general and not toward a precise plaintiff. In her opinion we read the following: "I do not share the vision of the Constitutional Court that while evaluating the scale of irreparable outcome we shall take into consideration only the volume of outcome resulting for only particular plaintiff. Suspension of the norm concerns not only the plaintiff, but – all persons, who are subject to this norm and there might be danger of causing irreparable damage towards them. Therefore, when determining scale of irreparable outcome, the Court must take into account interests of other people falling in the category of plaintiff and oppose it to consolidated interests."<sup>47</sup>

Despite the argumentation of Irine Imerlishvili, the Constitutional Court opposed to the public interests only interests of particular plaintiff. Deriving from the mentioned, considering the recent practice of the Constitutional Court, it is desirable, that when outlining scale and quality of possible damage caused by the disputed norm, the argumentation of plaintiff is clearly connected to the fact that the damage caused directly to plaintiff exceeds public interests by its importance.

45 Recording Notice from 25 November 2015 (case N3/9/682) of the Constitutional Court of Georgia, paragraph 1-10-11.

46 Recording Notice from 25 November 2015 (case N3/9/682) of the Constitutional Court of Georgia, paragraph 1-13-14.

47 Distinguished opinion of the member of the Constitutional Court Irine Imerlishvili on the Recording Notice of the Constitutional Court of Georgia from 24 October 2019 N 2/13/1384, paragraph 10.



It must be mentioned that according to the existing legislation, the plaintiff may ask for suspension of the disputed norm in general and not for the precise circle of persons, even if it significantly decreases the scale of danger caused to the interests of other people. The prove of the mentioned is the case “citizen of Georgi Beka Tsikarishvili v. the Parliament of Georgia”, in which the plaintiff applied court with the motion to suspend the disputed norm personally towards him. Moreover, in case if his precise query would not have been approved, the plaintiff would require suspension of the norm towards everyone. On this matter the Constitutional Court clarified: according to paragraph 5 of article 25 of the organic law of Georgia “on the Constitutional Court of Georgia”, “if the Constitutional Court of Georgia considers that operation of the normative act may cause irreparable outcome to one of the parties, it may suspend the disputed act and its relevant part.” Firstly, it must be noted that the essence and purpose of this regulation is not a suspension of disputed norm for particular persons individually, personally.”<sup>48</sup>

This regulation of the legislation of Georgia became subject to critic by various judges of the Constitutional Court and the Constitutional Court numerously. In the decision N3/2/577 from 24 December 2014 the Constitutional Court stated that “it was possible to enact less restricting mechanism by the legislation, which would protect fair balance, ... between protection of private and public interests. For instance, ... possibility to suspend operation of the disputed norm not generally, but only towards the plaintiff. In some cases, for instance, when the probability of possible damage caused by suspension of the norm is high, such mechanism may indeed represent more precise for solving problem, more adapted mechanism, which, on the one hand, protects interest of plaintiff to prevent irreversible infringement of his/her rights, and, on the other hand, suspension of the norm would cause less danger for infringing public interests or rights of third persons. Hence, negative effects caused by suspension of the disputed norm would be decreased.”<sup>49</sup>

It must be noted that, despite the critical position of the Constitutional Court and its members towards the regulation providing suspension only generally, for everyone, there were no amendment introduced to the legislation of Georgia in this regard and the acting legislation does not give possibility to personify the restriction. The plaintiff may require suspension of the norm only generally, towards everyone.

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48 Recording Notice from 13 February 2015 (case N1/1/592) of the Constitutional Court of Georgia, paragraph II-11.

49 Decision of the Constitutional Court of Georgia from 24 December 2014 (case N3/2/577), paragraphs II-25.

## CONCLUSION

The Constitutional Court of Georgia has extensive practice on the issue of suspending the operation of the disputed norm. Considering the approaches and requirements established in this practice will significantly assist authors of constitutional complaint and submission when formulating the motion on suspending the operation of the disputed norm. It must be noted, that the Constitutional Court of Georgia has contributed significantly to the development of this institute by its activity. Based in its decisions several amendments were introduced to the legislation of Georgia. According to the legislation acting nowadays, the query to suspend the disputed norm is admissible on any stage of discussion of the case, besides, decision made on the suspension of the disputed norm is in force for maximum the period of making the decision and term of this decision is not limited to 30 (in some cases 45) days any more. These amendments must be evaluated positively, however, legislative authority has not yet enacted amendments in the legislation of Georgia, which would give possibility to the Constitutional Court to suspend the operation of the norm only towards plaintiff, or particular group. It is desirable that the legislative authority considers position of the Constitutional Court and implements respective legislative amendments.