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TOPICAL PROBLEMS RELATED TO LEGAL EFFECT OF DECISION OF THE CONSTITUTIONAL COURT OF GEORGIA

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1. INTRODUCTION

Objective criteria of the effectiveness of the Constitutional Court are its decisions, which reflect real purpose and practical significance of the Court.

While interpreting constitutional norms the Constitutional Court creates a living constitution. Hence, it is vital that the Court ensures effective operation of the country's basic law through comprehensive knowledge of constitutional values and the use of these values as a foundation for its reasoning. When dealing with fundamental rights of an individual, the Court should ground its interpretations on the full understanding of the scope and content of each right in order to ensure that the practical content of the right interpreted be wholly adequate with the constitutional weight of the given right. Eventually, decisions of the Constitutional Court should support development of law. Whether the decisions satisfy these criteria, and how effective and fair is the Court, the answers to these questions are provided in the decisions. Though binding, the decisions of the Constitutional Court are open for public debate and assessments. In addition, the decisions are the right criteria for self-assessment of the Court (and for the judges). Therefore, to what extent the Court can develop itself depends on its objective and self-critical attitude towards its own decisions.

Clearly, the content of the decisions is essential for the aims of the Court to be realized in the first place. At the same time, it is of no less importance that legal guarantees of the Court's decisions be rightly understood and formulated in order to make legal consequences of these decisions and the Court's activity more accessible. There are several challenging issues related to the legal effects of the Constitutional Court's decisions. We will try to examine some of them in the present article.

2. THE DECISION OF THE CONSTITUTIONAL COURT IS FINAL

2.1. General overview

According to Article 89 (2) of the Constitution of Georgia: "The decision of the Constitutional Court shall be final…". Article 43 (8) of the Law on Constitutional Court states that, "A decision, a ruling, a recording notice and a conclusion of the Constitutional Court shall be final and shall not be subject to appeal or revision".

Decision "shall be final" means that there are no legal possibilities (authority) for changing the consequences of the decision through appeal by the parties or revision by any other higher body. Also, the decision is binding and constraining which means that there is no legal possibility for surpassing and ignoring its outcomes.

The Constitution of Georgian provides, that a special authority to exercise constitutional review is granted exclusively to the Constitutional Court of Georgia. This excludes all other branches of state power (political, as well as judicial) to exercise constitutional control. In the first place, this is a result of the doctrine of separation of powers. The Constitutional Court was created with the aim to support the operation of the doctrine. Under current legislation of Georgia, effectiveness of a decision of the Constitutional Court is protected from the legal possibility of being revised by any of the political or judicial bodies (common courts), because they lack the authority to exercise constitutional control. However, lack of such authority is not a sufficient guarantee for ensuring a decision's finality and inalterability. It is necessary that Georgian legislation contains sufficient and adequate guarantees for the enforcement of the decisions of the Court and maintain the consequences of its activities in practice.

The present article does not aim to analyze the problems related to the enforcement of the decisions of the Constitutional Court and study effectiveness or comprehensiveness of the legal mechanisms for imposing sanctions for not executing or surpassing the decisions. In this regard, we would like to point out some of the legislative guarantees provided by the Organic Law on Constitutional Court of Georgia: 1) Article 25 (1 pa) states that, " [A] decision of the Constitutional Court shall be final and the failure to observe it shall be punishable by law"; 2) the 4th paragraph of the same Article states that, "After the Constitutional Court recognizes a normative act or a part thereof as unconstitutional, it shall be impermissible to adopt/enact such a legal act, which contains the norms analogous to those declared unconstitutional", and 3) the 2008 addition to the 4th paragraph of the same Article states that, "If at the preliminary hearing the Constitutional Court finds that the impugned normative act or the part thereof contains the norms analogous to those declared unconstitutional… it shall deliver a ruling on the inadmissibility of the case and on recognition of invalidation of the impugned act or a part thereof".

2.2. Self-restraint of the Constitutional Court by Its Own decisions

It is important for the Constitutional Court to be bound by its own decisions for ensuring finality and binding nature of its decisions.

It is presumed that a final decision made by the Constitutional Court on a concrete case is correct, which in combination with a range of different reasons creates an obligation that a given position of the Court should not be revised. Hence, the judges of the Constitutional Court are constrained by both the Constitution and the Court's case-law (final and correct decisions on concrete issues).

The legislative answer to the Court's restraint by its own decisions is analogous. Namely, *the Article 18 ("d") of the Law of Georgia on the Constitutional Legal Proceedings* states that, "A constitutional claim or constitutional submission shall not be admitted for substantive hearing if: d) all the issues referred to in it have already been adjudicated upon by the Constitutional Court…"

This norm creates a common rule for potential claimants as well as for the Court itself. This norm says to the claimants that the Court will not resolve a dispute over the issues which had been considered and decided by the Court; a complaint will not be admitted for material consideration because the Court had adopted a final and binding decision concerning the given issue. Furthermore, this norm constrains the Court itself by the obligatory legal consequences of its own decision, and this is important not only for the authority of the Court but it also ensures the stability of legal safety.

From this point of view, *Article 21 (1) of the Organic Law of Georgia on the Constitutional Court of Georgia* requires a separate assessment. The said Article stipulates that: "1. If the Board of the Constitutional Court is satisfied that its position is different from the case-law of the Constitutional Court concerning a constitutional claim or a submission, the case should be referred to the Plenum of the Constitutional Court. 2. A ruling, a recording notice, a conclusion or a judgement of the Plenum of the Constitutional Court, which is different from the practice of the Constitutional Court, shall be adopted if it is supported by more than half of all the members of the Plenum". At the same time, *subparagraph "d" of Article 18 of the Law of Georgia on the Constitutional Legal Proceedings* allows an exception and gives possibility to the Court for the admission of a constitutional complaint to be considered materially in the instances envisaged by *Article 21 (1) of the Organic Law of Georgia on the Constitutional Court.*

It must be emphasized that, in this instance, a legislator does not aim at giving a chance to the party which is not satisfied by the decision to verify its doubts concerning the soundness and truth of the decision through an appeal. This norm does not create the mechanisms for appeal and revision which would cast doubts on the binding nature of the decision and would turn the Constitutional Court into a two instance organization. The parties are required to abide by the Court's decision as a final decision on a given case and execute it.

The above described mechanism is designed for ensuring the flexibility of the Constitution in time (adequacy with time). Its final aims are to create additional guarantees for the effective defense in the long term perspective and support harmonious progress and coexistence of the coun-

try's law with constitutional values. The Constitutional Court should not bring legal relations into a stalemate. It does not mean, of course, that the Court's decisions should be brought in conformity with political reality or new political challenges. The Court, as a nonpolitical body, can not be sensitive to these developments. On the contrary, in the times of political volatility, it is the Court which serves as an important leverage for maintaining stability. We are talking just about supporting dynamism of the Constitution and its chief guard, the decisions of the Constitutional Court in the course of law's development, which will eventually have positive effect on human rights, and protection of constitutional values. At the same time, it is necessary to possess corresponding leverages for the correct and purposeful application and development of this legislative mechanism. We would like to highlight two legislative guarantees:

a) The Court should adopt a reasoned ruling on transferring a case to the Plenum. The term "reasoned" means that a composition of the Court should present its own arguments to demonstrate that development of law identically to the old practice of the Constitutional Court will entail problems concerning comprehensive interpretation of the separate norms of the Constitution and effective protection of human rights. These arguments should prove that the Court's present legal position is different from the one adopted in its earlier decisions.

The burden of proof is high for those judges who do not agree with the old practice. In this situation, a judge is not allowed to ground his/her own position on the argument that a motivation in the earlier decision was insufficient or unconvincing and vague or he/she would have written the decision differently. His/her arguments must be very clear, demonstrable and convincing. They must persuade the Court that development of law according to the old practice will inevitably cause problems concerning the interpretation of the Constitution, effective protection of human rights and will bring about the risks of unfair development of law. If these problems are sufficiently tangible, then the judges deserve our respect for their attempts to solve them.

Thus, on the one hand this legislative regulation must not become a source for judicial competition as this approach will ruin an entire legal system. On the other hand, we must not close our eyes to the problem unmistakably foreseen by the judges if an existing (adopted earlier) decision is to be balanced with the possibility of reaching more effective protection of human rights.

b) When these cases are heard by the Plenum or by the full Court, this means that more intellectual resources take part in the discussion and there are more possibilities for listening to and balancing new and different ideas. This in turn gives us further guarantees that the Court will adopt a different decision only when it serves the abovementioned goals. Although it should be noted that effective and purposeful operation of this norm basically depends on the practice of its application. Therefore, it is very important that the judges take particular care and apply it reasonably. The Constitutional Court must be able to ensure effectiveness and viability of its own decisions and maintain and protect their weight and importance.

2.3. Practical Results of Article 21 (1) of the Organic Law of Georgia on the Constitutional Court

It should be noted that the norm has brought about positive results in the practice of the Court, for instance:

1) The Constitutional Court of Georgia recognized the 1st paragraph of Article 9 of the Law of Georgia on Assembly and Manifestation as constitutional in its N2/2/180-183 decision adopted on November 5, 2002 in the case "Georgian Association of Young Lawyers and Zaal Tkeshelashvili, Nino Tkeshelashvili, Maya Sharikadze, Nino Basishvili, Vera Basishvili and Lela Gurashvili v. Parliament of Georgia". The Court did not satisfy the claim and acknowledged the 1st paragraph of Article 9 of the Law of Georgia on Assembly and Manifestation which stipulates that: "Assembly or manifestation shall not be held in the building of Georgian Parliament, residence of President of Georgia, buildings of the Constitutional Court and Supreme Court, courts, prosecutor's office, police, penitentiary establishments, military units and sites, railway stations, airports, hospitals, diplomatic missions and within 20 meter radius of their territory, buildings of governmental institutions, local government bodies, and companies, institutions and organizations of special regime of labor safety or having armed guards. Entrances of these facilities shall not be fully blocked.

In the Court's opinion, a disputable norm contained an exact list of those buildings and premises where assembly or manifestation would obstruct operation of these institutions, which in its turn would be harmful to public safety and order

Some Georgian political parties, GYLA and Public Defender of Georgia, again lodged a complaint against Article 9, in addition to number of articles on Assembly and Manifestation, which (Article 9) has an analogous content to the norm which had been recognized constitutional by the Court earlier. In addition, the claimants asked the Court to declare a ban on assembly and manifestation within 20 meter radius of the buildings provided in the Article as unconstitutional.

In its 18 April 2011 decision on the case "Political Union of Citizens – Movement for United Georgia, political union of citizens – Georgia's Conservative Party, citizens of Georgia – Zviad Dzidziguri, Kakha Kukava, Dachi Tzaguria and Jaba Jishkariani, Georgia's Young Lawyers Association, and Public Defender of Georgia v. Parliament of Georgia", the Court declared the above mentioned norm unconstitutional because of the following circumstances:

a) The Constitutional Court particularly highlighted the importance of freedom of assembly in a democratic society. The Court noted that the right to assemble is protected by Article 25 of the Constitution, which also protects the freedom to choose a concrete place to assemble (manifest), and restricting this right is justifiable only in cases where there is a legitimate aim and when a measure is proportionate. The Court has indicated that a wording of Article 9 of the Law of Georgia on Assembly and Manifestation, at the time when the Court was considering the case, contained a list of the institutions which carry out important state or public functions and their appropriate operation is vital for the state and society, hence, they represent constitutional legitimate aims for restricting the right. In this respect, the Court fully shared the

position of the decision adopted on 5 November 2002. However, on the other hand the Court also indicated that a prohibition of assembly or manifestation within 20 meters of some important buildings which have to carry out specific functions can be justified, while the ban may not be necessary in case of other types of buildings. Constitutionality of a territorial restriction on an assembly is determined on the basis of specific circumstances, location of the building, and the threat an assembly or demonstration poses to the functioning of the building.[1] In this case, a legislator chose the uniform approach and established an identical restriction for all buildings with a blanket norm notwithstanding the differences in their importance. Besides, a disputable norm had worked also in those instances when an assembly (manifestation) did not pose any threat to orderly operation of important state or public institutions.

b) The Court considered the arguments about the unconstitutionality of the blanket restriction and noted that under the conditions of restriction established by the disputed norms, exercising the right to assembly and manifestation would have been practically impossible in some cases, because of the landscapes of cities and settlements and the location of some administrative bodies. These administrative buildings may be located in close proximity to each other and 20 meter radii from their entrances may overlap. The Court also took into account a prohibition on occupying a part of a public road except when the number of demonstrators requires it (it should be noted that this ban did not exist in 2002 when the case was being heard). The Court indicated that "all such considerations significantly limit the permissible public space for exercising this right, and, in some instances, completely exclude possibilities for assembling or demonstrating. Consequently, the disputable norm is too much restrictive and not necessary for pursuing a legitimate aim".[2]

Hence, the Court shared the position of its N2/2/180-183 decision, adopted on 5 November 2002, concerning the legitimate aims which may be so important that imposing such restrictions on freedom to assembly in certain cases may be required. The Court gave examples for permissible restrictions: "the above said does not exclude a legislator's authority to determine the space suitable for assembly and demonstration in order to ensure proper functioning of the institutions (taking into account functional specifics of institutions and their location) in the manner that does not ignore the essence of a constitutional right. The legislator is also authorized to establish the limits on the freedom of expression and the right to assembly and manifestation at such institutions or on such territories which require specific measures for safety. In exceptional instances, restrictions can be justified even when it makes practically impossible to hold a meeting on a particular territory… Scope of the state's discretion is too extensive when interference seems to be the only option in pursuing a legitimate aim to ensure safety. The blanket prohibition for these reasons may be justifiable in proximity of some of the institutions. For example, imposing restrictions on holding meet-

[1] N2/482,483,487,502 Decision of the Constitutional Court passed on 18 April 2011 in the case, "Political Union of Citizens – Movement for United Georgia, political union of citizens – Georgia's Conservative Party, citizens of Georgia: Zviad Dzidziguri and Kakha Kukava, Georgia's Young Lawyers Association, citizens: Dachi Tzaguria and Jaba Jishkariani, Public Defender of Georgia v Parliament of Georgia",

[2] N2/482,483,487,502 Decision of the Constitutional Court passed on 18 April 2011 in the case, "Political Union of Citizens – Movement for United Georgia, political union of citizens – Georgia's Conservative Party, citizens of Georgia: Zviad Dzidziguri and Kakha Kukava, Georgia's Young Lawyers Association, citizens: Dachi Tzaguria and Jaba Jishkariani, Public Defender of Georgia v Parliament of Georgia",

ings or demonstrations at some of those institutions listed in the disputable norm such as military headquarters or pretrial detention and penitentiary establishments may be reasonable, despite the fact it makes almost impossible to protest near to an addressee of the protest."[3] Although the Court explicitly noted that the interference in the right to assembly should be justified on the basis of an examination of the circumstances of each separate case, only in cases when it is really necessary, and when public interests directly face danger, a proportionate measure will be carried out to achieve these aims.

2) The Constitutional Court had to evaluate Article 4 (2) of the Law of Georgia on Assembly and Manifestation in its decision No. 2/2/180-183 adopted on 5 November 2002. This norm prohibits "calls for subversion or forced change of the constitutional order of Georgia, infringement on the independence or violation of the territorial integrity of the country, or calls which constitute propaganda of war and violence and trigger a national, ethnical, religious or social confrontation" while demonstrating or holding a meeting.

Concerning the abovementioned norm, the Court noted, that "this paragraph does not restrict freedom of speech; the restriction concerns only those calls which are unlawful. Similar calls are also punishable by the criminal legislation (Article 317, Criminal Code of Georgia)".[4] The Constitutional Court found that similar calls were not protected by the freedom of speech.

In its N2/482,483,487,502 decision adopted on 18 April 2011, the Court returned to the same problem and argued about paragraph 2 of Article 4. Although it found the norm to be constitutional, it made several interpretations in favor of freedom to assemble and manifest. Unlike its previous decision on the same issue, the Court did not move these calls from the protected scope of freedom of speech and grounded its deliberation on unfair nature of blanket, general prohibitions.

The Constitutional Court emphasized that the Constitution protects critical ideas including those which might be understood as too harsh or inadequate by a part of the society. It also indicated that "criticism of the government, including demands for resignation or change of a governmental system can not constitute grounds for restriction of freedom of expression, assembly and manifestation. The calls for resignation or replacement of the government are characteristic feature for a rally or demonstration where the people opposing governmental policies gather".[5] The Court further observed that "All citizens have constitutional rights to assemble and express their will or an attitude towards government that may in turn affect political or social developments, may cause resignation of the government or its members and bring about changes in political or government systems. It is

[3] N2/482,483,487,502 Decision of the Constitutional Court passed on 18 April 2011 in the case, "Political Union of Citizens – Movement for United Georgia, political union of citizens – Georgia's Conservative Party, citizens of Georgia: Zviad Dzidziguri and Kakha Kukava, Georgia's Young Lawyers Association, citizens: Dachi Tzaguria and Jaba Jishkariani, Public Defender of Georgia v Parliament of Georgia".

[4] Decision N2/2/180-183 adopted on 5 November 2002 in a case, "GYLA and Zaal Tkeshelashvili, Nino Tkeshelashvili, Maya Sharikadze, Nino Basishvili, Vera Basishvili and Lela Gurashvili v Parliament of Georgia".

[5] N2/482,483,487,502 Decision of the Constitutional Court passed on 18 April 2011 in the case, "Political Union of Citizens – Movement for United Georgia, political union of citizens – Georgia's Conservative Party, citizens of Georgia: Zviad Dzidziguri and Kakha Kukava, Georgia's Young Lawyers Association, citizens: Dachi Tzaguria and Jaba Jishkariani, Public Defender of Georgia v Parliament of Georgia".

essentially incorrect to match or equate this process which is characteristic to a democratic society with 'overthrow of the government' ".[6]

The Constitutional Court indicated that a statement which calls for committing violent or/and criminal act should not give raise to restrictions in every instance. The Court observed, "It is important that a law and its practical application distinguish between expressions which may contain hate speech and a harmful fragment of political, social or scientific discourse. On the other hand, a call, when its author is aware of potential outcomes and aims to achieve this result… formally containing calls to violence or such expressions which constitute separate and isolated instances do not create a real danger of violence in all cases. At the same time, it is necessary to evaluate the context in which the call has been made and the circumstances, in order to determine the possibility of danger. In each particular case, an authorized agency (person) should evaluate whether a statement represents a call for overthrow and forceful replacement of the government and whether it can cause violence. The state is authorized to intervene and stop an assembly (manifestation) only in cases when a call meets both criteria. The norm will be unconstitutional if it restricts freedom of expression without taking into consideration the above mentioned criteria".[7]

Through systemic interpretation of the norm, the Court determined that "such critical statements do not belong to the scope of the disputable norm, neither do those calls which contain the words of 'calling for formal overthrow', but the context in which these words were uttered, real essence of these words and aim, do not create a foundation for the establishment of violation of law…the prohibition established by the disputed norm relates to a call which implies a wish to commit a criminal act. The call which is made without such intent does not belong to the scope of the disputed norm"[8]

3. TOPICAL ISSUES CONCERNING ACCESSIBILITY OF LEGAL OUTCOMES OF THE CONSTITUTIONAL COURT'S DECISION

3.1. Enforcement of a decision and its practical results

Importance of a decision made by the Constitutional Court is naturally linked to those legal effects which can be brought about by the decision. Hence it is interesting to identify when and at which stage the results of the decision become concrete. Logically, expectation for changes is ob-

[6] N2/482,483,487,502 Decision of the Constitutional Court passed on 18 April 2011 in the case, "Political Union of Citizens – Movement for United Georgia, political union of citizens – Georgia's Conservative Party, citizens of Georgia: Zviad Dzidziguri and Kakha Kukava, Georgia's Young Lawyers Association, citizens: Dachi Tzaguria and Jaba Jishkariani, Public Defender of Georgia v Parliament of Georgia".

[7] Ibid.

[8] Ibid.

jectively connected with the decisions which satisfy the complaints. That is why a legislator tries to regulate the legal consequences of these decisions in legislation.[9]

According to Article 89 (2) of the Constitution of Georgia, ". . . A normative act or a part thereof recognized as unconstitutional shall cease to have legal effect from the moment of the promulgation of the respective judgment of the Constitutional Court". This norm tells us about: a) direct legal consequence of the decision, and b) time of occurrence of the effect.

Direct legal consequence of a decision is the loss of legal effect by the norm recognized as unconstitutional. This makes it possible to avoid violations of the Constitution and human rights in future and creates legal remedies for protecting and/or restoring the rights that are violated. It is vital to ensure timely and effective accessibility of these effects as the decision of the Constitutional Court will lose importance if it does not bring about those positive consequences for which they were adopted. Hence, at least relevant legislative guarantees must be at hand in order to produce them in reasonable time.

The initial direct legal consequence of the decision, cease of legal effect of the norm recognized as unconstitutional, as mentioned above, is linked to promulgation of the decision.[10] As for the promulgation, the *1st paragraph of Article 33 of the Law of Georgia on Constitutional Legal Proceedings* explains: "1. A decision of the Constitutional Court of Georgia shall take effect from the moment of its public pronunciation at the sitting and shall be promulgated in 'Sakartvelos sakanonmdeblo matsne' (Georgia's Legal Herald). A decision of the Constitutional Court in case of adjudication without oral hearing shall be promulgated within fifteen days in 'Sakartvelos sakanonmdeblo matsne' after the signature by the members of the Constitutional Court and shall be enforced from the moment of its promulgation."

So, the promulgation of the Constitutional Court's decision is considered to be its publication in a Georgian legal magazine called "Sakartvelos sakanonmdeblo matsne". Promulgation shall be ensured within 15 days in the following manner: a) in case the Court adjudicates at the sitting with oral hearing from the moment of its coming into effect (public pronunciation); b) in case the Court adjudicates at the sitting without oral hearing from the day when the members of the Constitutional Court sign the decision. It is noteworthy that an obligation for execution is connected to the promulgation stage. The 3d paragraph of Article 25 of the Organic Law of Georgia on Constitutional Court stipulates that, "A Constitutional Court's act shall immediately be enforced after its promulgation, unless otherwise provided by the act". This norm establishes an obligation for the immediate execution of the judgment on the one hand, although on the other hand, it believes that a starting point for the obligation is promulgation and accordingly, loss of legal effect of the normative act recognized as unconstitutional (if the decision itself does not determine different term for execution).

[9] Although, the practice demonstrated that legal outcomes of those decisions which are not satisfied should also be regulated by legislation, which means that an impugned norm is recognized constitutional and maintain its legal force. This issue encompasses many practical problems and requires to be studied separately, so we will not analyze it in the present article.

[10] Constitution of Georgia, Article 89 (2); Organic Law of Georgia on Constitutional Court, Article 25 (2).

In brief, the legislation connects the loss of legal effect by the norm recognized as unconstitutional or initial legal effect of the Constitutional Court's judgment and obligation of its execution to the promulgation of the judgment. With such background, it is interesting which legal effects the legislator connects to the enforcement of the judgment.

Generally, signatures and the act of adoption are not sufficient for a decision to come into effect. It is also necessary that it becomes public and accessible, so that interested parties know and understand their rights and obligations defined by the decision which is essential for the execution and operability of the decision. That is why it comes into effect from the moment it is publicly pronounced at the sitting (when the Court adjudicates at the oral hearing), which is also the signing (adopting) stage.[11] In case holding a trial without an oral hearing, the decision comes into effect from the moment of its promulgation, or within the 15 days after it is signed. A different rule applies for the decision to come into force in case of the decision adopted at the sitting without oral hearing as it is related to the fact that legislation[12] admits the possibility of not pronouncing the decision at the sitting. In this case, publication is a form of making the decision public, which is prescribed by law.

So, the unconstitutional norm becoming void is not always simultaneous with the decision's coming into effect. These processes become simultaneous only when a case is adjudicated at the sitting without oral hearing, as a decision coming into effect and the unconstitutional norm becoming void is connected to the promulgation of the decision. If we take into consideration that the initial practical legal effect of the constitutional complaint satisfied is just that the unconstitutional norm becomes void (and ensuing legal consequences), then it is unclear what legal effects can occur in the period from the moment of pronouncement of the decision adopted at the oral sitting till its promulgation (maximum 15 days before the unconstitutional normative act loses its legal effect)? As we have mentioned above, an obligation of execution occurs with its promulgation, but not with the pronouncement of the decision. Consequently, the legislation itself excludes any possibilities for the occurrence of legal effects from the moment of its enactment, which makes it unclear whether coming into effect is important at all. Expectations and demands of the interested parties who expect that their human rights will not be violated by the norm recognized as unconstitutional seem natural at such instances.

As for the decision adopted at the sitting without an oral hearing, as we have already noted, it comes into effect right with its promulgation. At this same moment, an unconstitutional norm loses legal force and an obligation of execution occurs. We should note one particular circumstance here. Although current legislation stipulates that a decision passed at the sitting without oral hearing may not be pronounced at the sitting,[13] it is still possible to apply a general rule on pronunciation of the decision. However in this case, a decision passed on the sitting without oral hearing unlike the deci-

[11] The 1st paragraph of Article 29 of the Law of Georgia on Constitutional Legal Proceedings;

[12] The 3rd paragraph of Article 29 of the Law of Georgia on Constitutional Legal Proceedings;

[13] The 3rd paragraph of Article 29 of the Law of Georgia on Constitutional Legal Proceedings;

sion adopted at the oral hearing comes into effect from the moment of promulgation and not from its pronouncement at the sitting.

Taking into account the abovementioned, we believe that it would be legally logical if a decision made at an oral hearing was linked to its promulgation instead of being related to its pronouncement (just like the decision taken at the sitting without oral hearing) as according to our legislation the decision can produce legal consequences right after promulgation stage. To be exact, under the Georgian Constitution, an unconstitutional norm loses its legal effect from the moment of promulgation and under the current legislation an obligation of execution occurs at this same moment. Besides, we think that it is reasonable to shorten the period for the promulgation of a decision to make time from pronouncement to its enforcement as short as possible.

In this regard, one more circumstance should be also taken into account. Since a normative act remains in force for 15 days before becoming void (from pronouncement/signing a decision till promulgation), it is able to produce unconstitutional consequences. It is supposed that an adjudicator will not apply the norm which is recognized as unconstitutional and adopt the decision grounded solely on the Constitution. However, he/she may not be aware of the decision before its promulgation because the copies of the decisions are sent only to those state agencies and officials which are listed in the 2nd and 3d paragraphs of Article 33 of Law of Georgia on Constitutional Legal Proceedings.

Official possibility for the interested parties to get access to the decision is its promulgation. Besides, in some cases an adjudicator may not found a regulating norm of direct action in the Constitution. After a norm is recognized unconstitutional, there arises a need for relevant regulation (in case such regulation does not exist) as an adjudicator will not be able to decide on how to regulate specific legal relations in conformity with the Constitution. On one hand adjudicators do not have any competence for that, and on the other hand if there is no regulating norm for specific relations, adjudicators may choose their own ways, which will be dangerous for legal safety by and large and may create numerous other legal problems.

Hence, we believe it is reasonable to establish a shorter deadline for the promulgation of a decision to reduce the probability of the application of a norm recognized as unconstitutional but not promulgated yet. Although in certain cases loss of legal effect by a normative act may not be a sufficient guarantee for avoiding further violations of rights. We will focus on one of these problems in the following chapter.

3.2 Can the Norm Recognized as Unconstitutional be Applied?

Case law of the Constitutional Court revealed a problem concerning the adjustment of legislative relations during the phase when the norm recognized unconstitutional cease to be in force untill the Parliament (any other body or high ranking state official which adopts normative acts) adopts

a new constitutional norm. What legal foundation should be used for relevant legal relations in this scenario?

Often, there is no need for adopting a new constitutional norm after the Court recognizes a norm unconstitutional, because loss of legal effect is in many cases sufficient for avoiding further violations of rights (for example, such situations occurred after the following judgments made by the Constitutional Court: N1/3/407 decision adopted on 26 December, 2007 in the case of "GYLA and Citizen of Georgia, Ekaterine Lomtatidze v Parliament of Georgia" and decision N466 adopted on 28 June, 2010; in the case "Public Defender of Georgia v Parliament of Georgia"). In certain cases, it is necessary to adopt a new norm (norms) after a norm is recognized unconstitutional or introduce additional regulations which will adjust specific legal relations in conformity with the Constitution. Otherwise, risks of violations of constitutional rights will occur because neither the Constitution's text contains an adequately concrete norm to apply to address a set of given relations nor the current legislation has suitable answers. How should specific legal relations develop in the absence of corresponding legal foundation, especially since failure to establish legal relations in some cases may cause violations of constitutional rights and/or legitimate public interests?

As we have already mentioned, according to the 3rd paragraph of Article 25 of the Law of Georgia on Constitutional Court, "A Constitutional Court act shall immediately be enforced after its promulgation, unless other term is provided for by the act". Given that legislative process requires certain amount of time, an obligation of "immediate enforcement" cannot produce a reasonable expectation that a legislator will adopt or introduce amendments the next day after the promulgation of the judgment. Although it is significant that a legislator adopts relevant changes (additions) in reasonably short time limits. In any case, even if the Parliament succeeds in adopting new changes in a short timeframe (though in some instances, it may require longer time because of the complexity of an issue or failure of political powers to reach a compromise), what is to happen with concrete legal relations before the new regulations are adopted? While an unconstitutional norm is void (it means that an adjudicator can not apply it) and a new norm is not adopted yet (a legislator did not or could not adopt it), how should legal relations evolve and what practical force does a judgment of the Constitutional Court have?

The Georgian legislation provides no clear answer to this problem. We will talk about some examples from the Court's practice and try to analyze those alternatives the Court turned to.

3. In the N1/3/136 decision made on 30 December 2002 in the case "Georgia's citizen Shalva Natelashvili v. Parliament of Georgia, President of Georgia and Energy Regulation Commission of Georgia", the Constitutional Court declared the following as unconstitutional: 1. "The part of a resolution adopted by the Energy Regulation Commission of Georgia (ERC) on 15 October 2002, on 'On Electricity Tariffs'", which concerned electricity tariffs for population; 2. "A rule for electricity bill payment in accordance with a fixed payment condition" adopted by the Energy Regulation Commission of Georgia on 31 December 2001.

The Constitutional Court found itself facing such problem after it declared a specific electricity tariff as unconstitutional. Voiding the legal effect of its regulatory norm lead to an overall nonexist-

ence of electricity tariff until a new normative act was adopted, the lawful result of which would be interrupting power supply before a new tariff could be established. The Court tried to find a way out through a resolution part of the decision where the Court noted that unconstitutional acts were legally void from the promulgation of the decision and gave the energy commission a two month period for calculating and determining new tariff (the Energy Commission of Georgia is asked to determine new electricity tariffs for the population before 1 March 2003 taking into account conditions described in the 1st paragraph of the motivation part of this decision.[14]), and simultaneously postponed the execution of the decision. It noted in the resolution part of the decision that, "IV. In accordance with the 3d paragraph of Article 25 of the Organic Law of Georgia on Constitutional Court, 1 and 2 paragraphs of the resolution part of the present decision shall be enforced from the moment when a resolution determining electricity tariffs for the population will come into force on the condition that the sums paid by the population for electricity according to the current tariffs in the period from the promulgation of the present decision until new tariffs, will be calculated on the basis of new tariffs".[15]

So, the Constitutional Court did not formally violate the Constitution and law regarding the enforcement of the decision and the moment an unconstitutional normative act ceases to be in force. and the Court recorded these demands in the resolution part, but at the same time, taking into account that legal consequences could produce violation of the consumers' rights, postponed both the declaration of unconstitutionality of the disputed normative acts (1st paragraph of the resolution part of this decision) and the cease of legal effect thereof, until new constitutional normative acts would have been introduced; the Court prolonged legal force of the unconstitutional normative acts by this decision.

We will try to analyze this alternative proposed by the Court in the light of legislative possibilities. Establishing an obligation of enforcement of the decision immediately after its promulgation, the *paragraph 3 of Article 25 of the organic Law of Georgia on Constitutional Court* takes into account the right of the Constitutional Court :a) to determine the date of a decision's enforcement; b) indicate the date in the decision. This norm is intended for such instances when immediate enforcement of the decision is objectively impossible. However, at the same time the Court is empowered to put a legislator within reasonable time limits to avoid the risks of unjustifiable delay in a case. It should be emphasized that this norm gives a possibility for postponing enforcement. It does not postpone either the recognition of the impugned norm as unconstitutional or cease of legal effects of the norm recognized as unconstitutional (as it happened in the abovementioned decision).

Postponement of a decision's enforcement cannot be considered to be a postponement of recognition of a disputed norm as unconstitutional as the latter implies postponing the decision itself and not its enforcement. A norm recognized as unconstitutional ceasing to be in force is a decision's consequence in itself and it does not require any efforts from relevant agencies to achieve it. Con-

[14] Decision N1/3/136 made on 30 December 2002, in a case "Citizen of Georgia Shalva Natelashvili v Parliament of Georgia, President of Georgia and National Commission of Energy of Georgia".

[15] Ibid.

sequently, cease of legal effect of the norm cannot be perceived as the execution of a decision. The term "execution" points to the concrete actions to be carried out by relevant bodies. In addition, loss of legal effects by the norm recognized as unconstitutional is regulated by the Constitution (Article 89, paragraph 2) and it does not imply exceptions. In accordance with the constitutional norm mentioned above, normative act or a part thereof recognized unconstitutional loses legal effect from the promulgation of the relevant decision of the Constitutional Court. Consequently, *3rd paragraph of Article 25 of the organic Law of Georgia on Constitutional Court* does not give us the possibility to solve the issue. Although the Constitutional Court can impose reasonable time limits on a legislator to introduce the norms in conformity with the Constitution, the issue of how legal relations should be developed still remains actual.

In the course of solving this problem, the Court surely was aware about the clumsiness of referring to the *3rd paragraph of Article 25 of the organic Law of Georgia on Constitutional Court*. For that reason, in a subsequent case where the Court faced the same dilemma, it had not referred to the said paragraph. In this case too, the Court gave time to a legislator to introduce a new constitutional norm. But, in its attempt not to produce negative consequences, the Court again raised some questions. For example:

2) In the decision N2/3/182, 185, 191 adopted on 29 January 2003, in the case "Ciztizens of Georgia: Phiruz Beriashvili, Revaz Jimsherashvili and Public defender of Georgia v. Parliament of Georgia", the Court recognized some of the criminal procedural norms as unconstitutional, which referred to some aspects of a person's detention and defense. These norms enabled: a) authorized bodies to arrest a person on the grounds not specified by the legislation. Despite the fact that a norm contained possible conditions for arrest, it also pointed to "some other information, serving as grounds for suspecting a person to have committed offence". This norm created independent and unclear grounds for the arrest of a person and posed threat to his rights; b) made possible to detain a person for two hours after arrest without a defender and relevant procedural safeguards, since the legislation linked arrest to filing official documents and not to the moment of physical restriction of freedom (official documents should have been filed within 12 hours after a person was brought to a police station or other investigative agency; c) determined time of starting communication between a prisoner and defender, which did not coincide with the moment of arrest and established a period for further communication between a prisoner and defender.

It was inevitable to recognize impugned norms unconstitutional as they caused violation of constitutional rights. However, the Court was aware that these norms, like majority of norms in the criminal procedure law, are continual and they can be used any time for a wide range of persons. That is why it is necessary to have relevant adjustments and regulations. Legal vacuum which may occur in these cases may enable an adjudicator to abuse his/her powers and cause human rights violations. Although Articles 18 and 42 of Georgia's Constitution contains relevant safeguards, the legislative norms prescribed in detail are necessary to make them effective. These legislative norms give an adjudicator clear and sufficient information about when, how and on what grounds he/she should act. After the recognition of the impugned norms as unconstitutional, the constitutional and legislative norms may not have been sufficient for the protection of rights and for reaching public

aims. For this reason, the Court gave an adjudicator reasonable time (3 months) for adjustments. The 3rd paragraph of the resolution part of the decision stipulates that, "3.3. Parliament of Georgia should be asked to develop and introduce relevant changes in the Code of Criminal Procedure Law of Georgia before 1 May 2003[16], taking into account the motivation and resolution parts of the present decision". However, it is unclear whether the Court meant to preserve legal effects for the unconstitutional norms until new norms would be adopted, as it did in the above said decision. All the more so, the Court did not point to the unconstitutional normative act becoming void in the resolution part. Interestingly, the Court's present act, as it has been noted, does not contain any indication of the suspension of the decision's execution and the norm establishing such authority.

We believe that these examples demonstrate the need for the regulation of the problem on a legislative level, seeing that the 3rd paragraph of Article 25 of the Organic Law of Georgia on Constitutional Court can not serve as a normative foundation for the said problem. Besides, it is a fact that the Court in both cases tried to avoid negative results.

Counterbalances of the recording notices in the decision N1/3/136 adopted on 30 December 2002 were: a) recognition of the norms violating human rights as constitutional in order not to let a decision for a certain period (until legislators adopt new changes) to violate other or same persons' rights/public interests; or b) inevitable violation of human rights or public interests as a result of the norms recognized as unconstitutional becoming void during time limits determined by law.

Logically, the Court cannot face such challenges, and its decisions cannot cause violations of human rights or public interests. When the Court reaches a conclusion that a norm is unconstitutional after balancing private and public interests drawing on a principle of proportionality, it must strike it as unconstitutional otherwise it will violate the Constitution. However, such correct decision must not produce more serious problems concerning human rights and public interests.

Although the Constitutional Court practically postponed the stages of adoption of a decision and cease of legal effect of a normative act on the grounds of postponement of execution of a decision, for which it did not have legal grounds, we believe that such approach may partially be one of the reasonable ways for solving the problem. For example, in extreme cases, the Court (when after recognizing a norm unconstitutional, a new norm is necessary for a concrete legal relations to be regulated because neither the Constitution nor other laws provide with sufficient normative grounds for regulating the legal relations in conformity with the Constitution. On the other hand rejecting such legal relations before a new adjustment is approved raises chances that these concrete human rights/public interests will be violated) must be authorized by law to defer the cease of legal effect of the unconstitutional norm until a new norm is approved, only after it is convinced through balancing the interests that cease of legal effect of the unconstitutional norm at the moment of promulgation of a decision will produce more serious results than operation of the impugned unconstitutional norm. It must be noted that these changes will not come into force without corrections of

[16] N2/3/182, 185, 191 decision adopted on 29 January 2003 in a case "Citizens of Georgia: Phiruz Beriashvili, Revaz Jimsherashvili and Public Defender of Georgia v. Parliament of Georgia."

the 2nd paragraph of Article 89 of the Constitution; b) in addition, since granting this authority to the Court means further legalization of human rights violations through applying unconstitutional norms and violation of those constitutional rights for protection of which this norm was recognized unconstitutional, additional relevant safeguards should be created for the period from the recognition of a norm as unconstitutional until it loses legal effect to ensure restitution of human rights and damages.