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A RETROACTIVE EFFECT OF THE DECISIONS OF THE CONSTITUTIONAL COURT OF GEORGIA

ABSTRACT

This article discusses the issue of mandatory retroactive power of the decisions of the Constitutional Court of Georgia. In particular, a special attention is drawn to the fact that the Constitutional Court of Georgia should be given discretion in exceptional circumstances to determine the time for an invalidation of an unconstitutional norm. This shall refer to a norm, under which a responsibility was imposed on a person, or on the grounds of this norm a person has incurred damages through the activity of the state. The article highlights some of the main arguments to support above-mentioned arguments. Among them, from the standpoint of Human Rights protection, the focus lies on the ineffectiveness of the current model of constitutional control and the necessity of its improvement as well as Case-Law of the Constitutional Court of Georgia, opinions of its members and experiences of other countries. In addition, it is also our argument that from a purely legal point of view in a legal theory, it is admissible to give retroactive effect to the decisions of the Constitutional Court of Georgia. Finally, the purpose of this article is to also show that an application of the retroactive effect largely stipulates the transformation of the Constitutional Court of Georgia into an effective domestic remedy, which will allow individuals to protect and restore their rights.

1. TEMPORAL EFFECTS OF THE CONSTITUTIONAL COURT'S DECISION

There are three types of temporal effects of the Constitutional Court's decision: the first type is an *ex nunc* effect, which implies that the statute is declared null and void after the announcement/promul-

gation of a decision, while pre-existing relations, on the basis of this statute, remain valid. The second type is called an *ex tunc* effect, which means that the court's decision has retroactive effect, and at this time the statute actually becomes void, which means that all relations and actions created on the grounds of this statute should be abolished. The third one is a future-oriented *pro future* effect, which envisages that the Constitutional Court's decision and an annulment of a statute respectively, comes into force at a future moment¹. These effects are closely linked to two important legal principles: *legality* and *legal certainty*². In the given article the main accent will be focused on *ex tunc* effect, which is related to the retroactivity of a decision.

2. THE MODEL OF CONSTITUTIONAL REVIEW IN GEORGIA

Three important documents are mainly associated with an enforcement of constitutional review in Georgia: the Constitution of Georgia (adopted on 24 August 1995), the Organic Law of Georgia "on the Constitutional Court of Georgia" (adopted on 31 January 1996), and the Law of Georgia "on Constitutional Legal Proceedings" (adopted on 21 March 1996).

According to Article 89 of the Constitution of Georgia and Article 19 of the Organic Law of Georgia "on the Constitutional Court of Georgia", the Constitutional Court, alongside with other key issues, shall:

- a) Adjudicate the constitutionality of the Constitutional Agreement, law, normative acts of the President and the Government, normative acts of the supreme state bodies of the Autonomous Republic of Abkhazia and the Autonomous Republic of Ajara;
- f) Consider the constitutionality of normative acts in terms of fundamental human rights and freedoms enshrined in Chapter Two of the Constitution on the basis of an individual's lawsuit;

The model of constitutional control of Georgia has several stand-out qualities:

1. The Constitutional Court exercises control only over the normative acts and has no authority to consider constitutionality of individual legal acts³.
2. All legal and natural persons, group of individuals, as well as the Public Defender have the right to apply to the Constitutional Court to challenge the constitutionality of legal norms⁴.

¹ Verstraelen S., The Temporal Limitation of Judicial Decisions: The Need for Flexibility Versus the Quest for Uniformity, German Law Journal, Vol. 14 No. 09, 2013, 1690. [Verstraelen]; Hufen F., Lutz N., on behalf of the Federal Ministry of Finance of Germany, Comparative law analysis on the legal situation in the Member States of the European Union, Restriction of the Effects of Judgments in Cases of Ascertainment of their Unconstitutionality, Summary, 2008, p.2; See <http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Europa/Summary.pdf?__blob=publicationFile&v=3> [10.11.2015][Hufen].

² Ibid. Verstraelen, 1690.

³ Organic Law of Georgia on the Constitutional Court of Georgia, Article 19 (1), (e).

⁴ Organic Law of Georgia on the Constitutional Court of Georgia, Article 39 (1).

3. The right to submit a constitutional complaint is also attributed to the President of Georgia, the Government of Georgia and not less than one fifth of Members of the Parliament⁵.
4. The mechanism contains element of *action popularis*, which means that a normative act can be challenged by any person, irrespective of whether the norm violated his/her rights. For this reason, it is not necessary for the applicant to appear as a real victim; even existence of potential or hypothetical risk of infringement of his/her rights is enough.⁶ However, there must be some connection between the appellant and the norm that has been appealed; otherwise it will not meet an admissibility criteria⁷.
5. The Public Defender of Georgia has also the right to lodge a claim⁸.
6. The mechanism of Judicial referral operates in the domain of the Constitutional Legal Proceedings of Georgia, according to which, "If, while considering a particular case, a court of general jurisdiction concludes, that there is a sufficient ground to deem the law or other normative act, applicable by the court, fully or partially incompatible with the Constitution, the court shall suspend the consideration of the case and apply to the Constitutional Court..."⁹
7. A ruling of the Constitutional Court is final and it is binding on everyone. A normative act thereof recognized as unconstitutional implies its removal from legal system and not only revocation for the parties involved in court cases. Thus, in this case the effect of *erga omnes* is used.
8. The Constitutional Court of Georgia is not authorized to challenge actions of the state bodies or review the Common Courts' judgments.

It should be noted that *ex nunc* effect operates within the model of Constitutional Control of Georgia. As indicated in Article 89 (2) of the Constitution of Georgia, it is peremptory that "normative acts or their parts recognized as unconstitutional have no legal power from the moment the appropriate decision of the Constitutional Court is published." At the same time, Article 20 of the Organic Law of Georgia on the Constitutional Court states: "recognition of a law or other normative act as unconstitutional shall not imply annulment of the sentences and decisions as adopted earlier by the court on the basis of the act in question, it shall cause only the suspension of their enforcement in accordance with the procedure established by procedural legislation." However, it should be emphasized that under Article 310 (d) of the "the Criminal Procedure Code of Georgia" the Constitutional Court's decision, which has recognized the provision from the criminal law in this case as unconstitutional, shall be subject to revision of the conviction due to newly revealed circumstances. Accordingly, the decision of the Constitutional Court might have a retroactive effect if a criminal law, recognized as

⁵ Organic Law of Georgia on the Constitutional Court of Georgia, Article 33 (1).

⁶ T. Tugushi, G. Burjanadze, G. Mshvenieradze, G. Gotsiridze and V. Menabde, Human Rights and Case-Law of the Constitutional Court of Georgia, Tbilisi, 2013, 610-612.

⁷ Law of Georgia "on Constitutional Legal Proceedings", Article 16 (1).

⁸ Organic Law of Georgia on the Constitutional Court of Georgia, Article 39 (1).

⁹ Organic Law of Georgia on the Constitutional Court of Georgia, Article 19 (2).

unconstitutional, was used in a criminal case. However, in doing so, pursuant to the Criminal Procedure Code of Georgia, it is necessary for the person to apply to a court of common jurisdiction to review its verdict. It is also noteworthy that a statute of limitations does not work in this case and due to newly revealed circumstances there is an unlimited time to reconsider the verdict. Hence, Constitutional Control can be characterized briefly in this way: *posteriori*, abstract control, including the elements of *action popularis* and the mechanism of judicial referral. A decision of the Constitutional Court has *erga omnes* and *ex nunc* effect.

3. THE EFFICIENCY OF THE MECHANISM FOR THE CONSTITUTIONAL REVIEW IN GEORGIA

The current mechanism for the constitutional review in Georgia has some faults, which significantly affects an assessment of the Constitutional Court, as the mechanism for Human Rights Protection. Despite the fact that individuals also have the right to apply to the Constitutional Court of Georgia, it cannot be extended beyond the limits of control of abstract norms. The existing model, in fact, does not include a possibility of restoring the rights that have already been violated.

For example, according to Article 13 (2) of the Law of Georgia “on Constitutional Legal Proceedings”, “abrogation of the disputed act or its recognition as invalid during the consideration of the case, causes its suspension at the Constitutional Court.” Nevertheless there is an exception to this rule only in the case, when the annulment of a norm had occurred after the case was submitted for the consideration on merits. At the times like this, the court has the authority to continue with the proceedings. This case evokes some problems if there is a real victim, whose rights have been violated through a disputed norm/act which then was made void by the legislative body that had once adopted it. In such cases, the victim is in fact deprived of the right to litigate at the Constitutional Court. For example, just for this reason, by a judgment of 24 June 2014, the Constitutional Court of Georgia dismissed the constitutional claim in the case no.559 “Irina Rukhadze, publishing house “Intellect” and others vs. the Ministry of Education and Science of Georgia.”

At the same time, as we have already mentioned, when the norm is declared null and void by the Constitutional Court, it does not affect the annulment of previous judgments and decisions arising from this norm and only leads to a stay of execution. Accordingly, there is no mechanism for constitutional legal proceedings, which would provide an opportunity to restore the violated rights to a certain extent.

It should be noted that in the case “*Apostol vs. Georgia*”, the European Court of Human Rights discussed how the Constitutional Court of Georgia was ensuring the effective domestic remedy in

compliance with Articles 13 and 35 of the Convention. The Court concluded that, since the current system of individual constitutional complaints in Georgia lacks effective mechanisms for redressing human rights violations, it couldn't be regarded with a sufficient degree of certainty, as an appropriate remedy for the complaint about non-enforcement¹⁰. One of the reasons of the above-mentioned conclusion, from the Court's standpoint, lies in the fact that the declaration of a normative act as unconstitutional, cannot result in the quashing of the judicial decisions already taken on the basis of the unconstitutional act. Furthermore, it cannot even terminate the ongoing enforcement proceedings but can merely suspend them¹¹.

Although the conclusion of the European Court of Human Rights in this particular case was made in connection with the non-enforcement of Common Courts' judgments, it represents important explanations for the assessment of the Constitutional Court of Georgia – as an effective mechanism for protection of human rights.

It should be emphasized that, in one of its cases the Constitutional Court of Georgia had admitted that the Constitutional Court could not be an effective mechanism to redress the infringed rights of individuals. Namely, the judgment points out that "The decisions of the Constitutional Court often do not cover legal relations that are generated before a decision is reached and there is a risk that a person will not be allowed to restore his/her rights after the Constitutional Court's judgment has been delivered" (unofficial translation).¹²

4. INDISPENSABILITY FOR AN APPLICATION OF RETROACTIVE EFFECT

In the light of the above considerations, it is necessary to refine an existing mechanism in order to make it possible through the Constitutional Court proceedings to improve the situation of the people whose rights were breached with disputed act before the judgment of the Constitutional Court was delivered. For the time being, the Constitutional Court does not have any legislative basis and leverage to determine, at its discretion, the moment when the statute loses its legal power. It is only capable to suspend the enforcement of the judgment under Article 25 (3) of Law of Georgia "on the Constitutional Court of Georgia."

¹⁰ The judgment of 28 February 2007 of the European Court of Human Rights on the case "*Apostol v. Georgia*", para.46.

¹¹ *ibid.* para. 43.

¹² The judgment of 24 December 2014 of the Constitutional Court of Georgia on the case of „N(N) LE Human Rights Education and Monitoring Center (EMC) and Citizen of Georgia Vakhushti Menabde v. Parliament of Georgia“; no.3/2/57; II, para. 32.

It is worth stressing that, even the members of the Constitutional Court, focus their attention on the problems, which exist in the Constitutional legal proceedings and on the need for their solution. Namely, Judge Lali Papiashvili points out that a existence of an *ex nunc* effect and the fact that the court is not empowered to suspend the declaration of a non-constitutional norm except the suspension of the decision from the entry into force, triggers off some complications¹³.

Judge Ketevan Eremadze – the member of the Constitutional Court of Georgia emphasizes that the reality in which the Court lacks the authority to handle the timing of declaring legal act as null and void, provokes a significant problem and makes it challenging for the Court. Judge Eremadze believes that when the norm recognized as unconstitutional, loses its legal force (before the Parliament adopts a new statute) and additionally causes significant damage to the public interests, the Constitutional Court is forced to make a choice between human rights and the public interest, which is wrong in itself.¹⁴ Particularly, the court came up to the same problems in the following cases: no. 1/3/136 and no. 2/3/182, 185, 191.

Judge Dimitri Gegenava shares similar sentiments on this issue and talks about the existing flaws and obstacles related to a decision enactment. He believes that “the court must be able to determine time limits regarding the declaration of a loss of legal power of an act recognized as unconstitutional¹⁵.”

Judge Ketevan Eremadze has linked this problem to the future effects; however, following the same logic, we also blunder against the problem, regarding legal relations generated, before the decision has been reached by the Constitutional Court. For instance, if a person’s property is seized by the state on the basis of challenged norm, the recognition of this norm as unconstitutional does not help that person to restore his/her rights, they are not able to retrieve their property. Recognition of an act as unconstitutional by the Constitutional Court confers some significance on those safeguards that intend to avoid violation of rights in the future; however, it cannot insure to redress infringed rights. It is also true, that in this case, the Constitutional Court does not face the dilemma of making the choice between protecting human rights and public interest. Nonetheless, the situation is no less awkward. It is forced to adjust the effect of a decision to the time of its promulgation while a claimant should only be satisfied with the fact that he was able to prove his own truth. Ultimately, Judge

¹³ Wolfgang Babeck, Lessons from Georgia : a role model for constitutional reform? *Rewriting a Constitution: Georgia’s shift toward Europe*; GIZ; 2012; 172. (According to Wolfgang Babeck, this issue related to constitutional reform of Georgia, was raised by LaliPaphiashvili at the Berlin conference of 14-16 July 2010, where the new Draft Constitution of Georgia was discussed).

¹⁴ Ketevan Eremadze, “Topical problems related to legal effect of decision of the Constitutional Court of Georgia”, April, no.6, 2013; p. 17.

¹⁵ Dimitri Gegenava, *Constitutional Justice in Georgia: Major systemic problems in Proceedings*; Tbilisi, 2012; pp. 66-68.

Eremadze comes to the conclusion that “the Constitutional Court 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 norm¹⁶.”

Similarly, the Constitutional Court must also have the authority to associate, in exceptional cases, the loss of legal force of an unconstitutional act with the past. At that point, the court, of course, should identify and assess all relevant circumstances and make this decision on the grounds of weighing the clashing values. Accordingly, the Constitutional Court must be free to choose the moment of loss of a legal effect of a norm, recognized as unconstitutional, in the future, as well as in the past.

5. THE EFFECT OF RETROACTIVITY OVER THE LAW OF RESPONSIBILITY AND THE DAMAGE INCURRED THROUGH AN ACTION OF A STATE ON THE BASE OF AN UNCONSTITUTIONAL NORM

As we have already mentioned, in accordance with the current legislation, the Constitutional Court’s decision in criminal proceedings, represents the newly disclosed circumstances, pursuant to which, it is possible to review the case. However, this only applies to criminal cases, and do not include, for example, administrative offenses. It is noteworthy that the Constitutional Court of Georgia gave a broad interpretation of the concept of “responsibility” in the context of Article 42 (5) of the Constitution of Georgia, pointing out that it envisages any legal responsibility and is related to the wrongful act in general¹⁷ which may occur not only in criminal law. It is also noteworthy that under Article 42 (5), an application of retroactivity in favor of an individual is possible if it abrogates or mitigates responsibility. From the standpoint of the Court – “by this rule, the Constitution expresses humanistic approach towards citizen rights and it, through this way, stimulates positive actions from their side. The new normative reality replaces the old one and consequently, strengthens the guarantees for protection of the rights of the offender¹⁸.”

¹⁶ Ketevan Eremadze “Topical problems related to legal effect of decision of the Constitutional Court of Georgia”, April, no.6, 2013.

¹⁷ A judgment of the Constitutional Court of Georgia on the case “the Public Defender of Georgia, citizen of Georgia Elguja Sabauri and citizen of Russian Federation Zviad Mania v. the Parliament of Georgia”; 13 May 2009, no.1/1/428,447,459; II (4,5).

¹⁸ A judgment of the Constitutional Court of Georgia on the case “the Public Defender of Georgia, citizen of Georgia Elguja Sabauri and citizen of Russian Federation Zviad Mania v. the Parliament of Georgia”; 13 May 2009, no.1/1/428,447,459; II (3).

Thus, an application of retroactive force through abrogating or mitigating of responsibility of norms is permissible under the Constitution of Georgia and moreover, in my opinion, it is even stimulated. Accordingly, in the context of abovementioned discussion, giving the retroactive effect to the Constitutional Court's decisions regarding the norms connected to the responsibility is thought to be justified. Furthermore, I believe, it is unacceptable to continue or maintain the responsibility for a person whilst the norm, under which a state had imposed the responsibility upon the person, was declared unconstitutional by the Constitutional Court. Consequently, under the condition like this, the person should have the opportunity to regain the rights. Therefore, it is important to expand the current mechanism and to apply retroactivity not only in the domain of criminal law, but also in the general area of responsibility.

The second important issue is that the retroactive effect should be applicable to those cases, when the damage is caused by a state's action on the basis of unconstitutional rule, that is, when a law enabled the state to act in such a way that was harmful for a person. The aforementioned includes a series of disputes over administrative cases and the types of private-law relations, where a state is a party. It should be noted that while assessing the constitutionality of the limitation period in the civil procedure in one of the cases, the Constitutional Court separated such occasions, when a violation of a person's interest by the court's decision is, on the one hand, induced by an illegal/criminal action of a state (the court and other state institutions, public officials) and, on the other hand, by other persons (private persons).¹⁹ The court emphasized that "the insurance of the right to restore the damages incurred through the state's violation of law, is the most important aspect of legal security"²⁰ (unofficial translation). In contrast to private persons, a state cannot have the expectations to get the legal security from others. Therefore, in the court's opinion, objectives related to the limitation period, as well as, the standard for evaluation of this relation is quite different, when a state represents (including the private-legal relations) the other party²¹. Such type of approach shows that an application of retroactive effect in such cases on the one hand, does not jeopardize the legal security, whilst on the other hand, it is an opportunity to restore the violated right from the state. Furthermore, it is an exact obligation of a state in the context of abovementioned legal security.

Hence, in the present case, general standards should be established by law, which will guide the Constitutional Court in its decisions whether the particular decision should be vested with retroactive effect or not. These standards constitute an application of the retroactive effect in the limits of law of

¹⁹ A judgment of the Plenum of the Constitutional Court of Georgia on November 5, 2013, №3 / 1/531 in the case of "citizens of Israel – Tamaz Janashvili, Nana Janashvili and Irma Janashvili v. the Parliament of Georgia"; II (30).

²⁰ A judgment of the Plenum of the Constitutional Court of Georgia on November 5, 2013, №3 / 1/531 in the case of "citizens of Israel – Tamaz Janashvili, Nana Janashvili and Irma Janashvili v. the Parliament of Georgia"; II (36).

²¹ *ibid.*

responsibility and in those types of cases, when a person has suffered damages from a state's action on the basis of an unconstitutional norm.

6. THE EXPERIENCE OF OTHER COUNTRIES

6.1 General review of the application of the retroactive effect

“Only relatively few countries introduced an *ex tunc* effect of constitutional court decisions, such as Andorra, Belgium, Germany, Hungary, Italy, Poland, Portugal, Russia, Slovenia and “the former Yugoslav Republic of Macedonia”²². In addition to this, there is a growing tendency of putting limitations on the application of retroactive effect and deviating from an *ex tunc* effect²³. For example, the so-called new Member States, except for Estonia, followed the Austrian model and founded their own constitutional review on an *ex nunc* effect²⁴. However, it is noteworthy that even in the countries, where mainly an *ex nunc* effect is in current use, the deviation from this effect is also possible. Constitutional courts have some discretion to decide when their decisions will go into effect and consequently are able to conduct selection process and decide the time when the statute is considered to be invalid²⁵. This is induced with several factors, including the safeguard for the achievement of a fair balance between legality and legal security as well as legal certainty. One of the major reasons of an application of retroactive effect is giving the possibility to individuals for restitution of their rights. If a constitutional court's decision has an effect only in the future or even in the present, and does not affect an applicant, whose right has already been violated by an unconstitutional normative act, he/she will lose an interest in applying to the Constitutional Court. Therefore, a retroactive effect encourages individuals to argue about the unconstitutionality of a normative act in a constitutional court. For this reason, in some countries instead of using a general principle of annulling a norm (“*erga omnes*”), retroactivity affects an applicant's case exclusively. For instance, in Hungary, Austria and Armenia.²⁶

²² Study On Individual Access To Constitutional Justice, Adopted by the Venice Commission at its 85th Plenary Session, Venice, 17-18 December, 2010, 50, para 188. see <[²³ Verstraelen S., The Temporal Limitation of Judicial Decisions: The Need for Flexibility Versus the Quest for Uniformity, German Law Journal, Vol. 14 No. 09, 2013, 1690. \[Verstraelen\]; Hufen F., Lutz N., on behalf of the Federal Ministry of Finance of Germany, Comparative law analysis on the legal situation in the Member States of the European Union, Restriction of the Effects of Judgments in Cases of Ascertainment of their Unconstitutionality, Summary, 2008, pp. 7, 9; See <\[²⁴ *ibid*, p. 7.\]\(http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Europa/Summary.pdf?__blob=publicationFile&v=3> \[10.11.2015\]\[Hufen\].</p>
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²⁵ Venice Commission, 51, paras 191-192, 195;

²⁶ Venice Commission, 52, par. 195;

It should be noted that an application of a retroactive effect, in most cases, does not entail the revocation of Common Courts' final judgments based on unconstitutional norms. This would greatly oppose the legal security and also would create problems with regard to the legal certainty. Therefore, in those countries, where an *ex tunc* effect operates, retroactive effect does not influence final court decisions, however, even in these cases there are some exceptions. The Constitutional Court's decisions can have retroactive effect when the rule declared unconstitutional, concerns criminal matters²⁷. In addition, it should be emphasized that the retroactive effect, concerning criminal cases, operates in some of those countries, where an *ex nunc* effect is mostly applicable; for example, in Albania, Hungary and Moldova²⁸.

It is worth paying attention to the research, carried out by the Venice Commission, according to which, actually, every state has a certain mechanism, which allows an application of retroactive effect to some extent, regardless of the fact that a state mainly operates with the help of an *ex nunc* or *ex tunc* effect²⁹.

6.2 An existing Model of Constitutional Review in Portugal, Spain and Germany

The process of giving retroactive effect to the Constitutional Court's decision is used for example, in Germany, Spain and Portugal. First of all, it is important to mention what kind of models of the constitutional control are in current use in those countries.

There is a diffuse system of /review in Portugal and Spain; however, in both cases there is an independent body of constitutional control – the Constitutional Court, vested with specific and exclusive powers. The Constitutional Court of Portugal is entitled to assess General Courts' decisions in relation with constitutionality and abrogate them, after which the case is sent back to the court for further reconsideration³⁰. It should be emphasized that the Portuguese Constitutional Court's decision has an effect only in relation with the case, which is under consideration; however, the court has the discretion to confer an *erga omnes* effect upon its decision provided that an assessment of a rule occurs through new procedures³¹. In addition to this, the request for a declaration of unconstitutionality without appealing against the General Courts' decisions, takes place only in the framework of an abstract control. In this occasion only the Ombudsman and Government Bodies have the right to apply to a court. In this case, the declaration of the norm's unconstitutionality has a general nature³². Additionally, it must be indicated that *a priori* control of rules is also available in Portugal³³.

²⁷ Venice Commission, 50, paras 193-194;

²⁸ *ibid.*

²⁹ Venice Commission, 52, para 195.

³⁰ <<http://www.tribunalconstitucional.pt/tc/en/jurisdiction.html#competences3>>[10.11.2015].

³¹ Venice Commission, 46, footnote 186.

³² Constitution of The Portuguese Republic, Article 281.

³³ Constitution of The Portuguese Republic, Article 278.

In Spain a full constitutional complaint is in current use, which means that the court considers not only normative, but also individual administrative acts and actions or omission of public bodies, after all other domestic remedies have been exhausted by an individual³⁴. Moreover, there are both, abstract and concrete controls available in Spain, whilst the recognition of a norm's unconstitutionality implies an *erga omnes* effect.

As for Germany, the full constitutional claim is also at work in here. The German Constitutional Court is entitled to declare unconstitutionality of an action or law/norm of public bodies as well as to repeal the General Courts' decisions. At the same time, there is also the rule of exhaustion of other remedies, which implicates that the constitutional complaint is admissible only after all other available remedies have been exhausted³⁵.

6.3 A scope for an application of retroactive effect

In Portugal and Spain the retroactive effect is considered in the context of enforcement of an abstract control, under which only state bodies have the right to ask for a declaration of a norm's unconstitutionality. Pursuant to Article 282 (1) of the Constitution of the Portuguese Republic, a declaration of unconstitutionality or illegality has an effect as of the moment at which the norm declared unconstitutional or illegal came into force and at the same time, according to this decision, any of the norms, that might be repealed, causes its revalidation (the return to its previous position) through retroactive effect. It is noteworthy that Article 282 (4) directly indicates the occasions when deviation from retroactivity is permitted. Namely, it is indicated that when required for the purposes of legal security, reasons of fairness or an exceptionally important public interest, (the grounds for which must be given), the Constitutional Court may determine a scope for the effects of the unconstitutionality or illegality that is more restricted than that provided for in this Article.

The mechanism established in above mentioned jurisdictions, does not implicate that final decisions will have retroactive effect, except as it comes to the law of responsibility. In this regard, the most extensive clause can be found in Article 282 of the Constitution of the Portuguese Republic which states that in relation to penal or disciplinary matters, or an illegal act under regulatory orders or a norm that was less favorable to the accused person, retroactive effect can be implied. As regards Spain, the only exception occurs in the case of criminal or administrative liability, where the nullity of the rule applied, would entail a reduction of the penalty or sanction or exclusion, exemption or limitation of liability³⁶. In the case of Germany, according to Act 79 of the German Federal Constitu-

³⁴ The Organic Law of Spain "on the Constitutional Court", Article 41.

³⁵ <<https://www.vfgh.gv.at/cms/vfgh-site/english/jurisdiction1.html>>[10.11.2015].

³⁶ Verstraelen, 1694; the Organic Law of Spain "on the Constitutional Court", Article 40.

tional Court if the annulled norm was concerning the Criminal Procedure Law, the new proceedings are permitted.

The German system of constitutional review is very significant; it differentiates between nullity and the incompatibility of laws with the Basic Law. Similar distinction occurs in Spain too³⁷. The former openly indicates the retroactive effect of a decision, whereas the latter implies that a court has the discretion to determine the temporal effect of its decision, that is, to constrain retroactivity and, moreover, in some cases, it has the discretion to connect the annulment of a norm to the future time. In most cases, the German Federal Constitutional Court (FCC) applies this discretion, especially when it comes to the Tax Law and is closely related to the finances of the country³⁸. Articles 78 and 95 (3) of the German Federal Constitutional Court (FCC) Act exactly refers an annulment of a norm and points out that in case of incompatibility with the Basic Law, it shall void the law. The difference between a nullification of a law and an announcement of its incompatibility with the Basic Law has emerged through practice. It is vital that neither the Basic Law nor the Law on the FCC specify the legal consequences of such declaration of incompatibility. Consequently, the FCC assumed a wide margin of appreciation in deciding on the possible consequences of such a declaration³⁹.

6.4 Absolute Retroactivity

In contrast to the above mentioned approaches, the Belgium-based absolute retroactivity enables the decision of the constitutional court to be applicable not only for pending but even civil, criminal and administrative legal proceedings that have already been completed. At the same time, it is worth stressing that notwithstanding the expiry of the time limits set by the laws, administrative or judicial appeals, may still be lodged against acts and regulations, as well as against decisions of other courts of law, insofar as those decisions are based on a provision of a statute, which has been subsequently nullified by the Constitutional Court⁴⁰. Since judgments and regulations are not direct consequences of the unconstitutional act, they do not automatically disappear from the Belgian legal order. Instead, further actions and new proceedings are needed⁴¹. Despite the fact that Article 8 of the Special Act on the Belgian Constitutional Court, empowers the Belgian Constitutional Court to mitigate an effect *ex tunc* by giving its decision an effect *ex nunc*, also to imply an effect *pro future*⁴², unlike the ones of other countries, the Belgian Constitutional Court does not use its competence to limit the retroactive effect excessively⁴³.

³⁷ Verstraelen, p. 1696.

³⁸ Hufen, p. 5.

³⁹ Verstraelen, p. 1696.

⁴⁰ SPECIAL ACT OF 6 JANUARY 1989 ON THE CONSTITUTIONAL COURT, Article 18 of the Belgium's Organic Law.

⁴¹ Verstraelen, p. 1695.

⁴² Verstraelen, p. 1697.

⁴³ Verstraelen, p. 1698.

6.5 Conclusion

As a consequence, pursuant to the opinion of the Venice Commission and the mechanisms existing in various countries, it can be concluded that an application of an *ex tunc* effect and imposition of a retroactive effect respectively, does not necessarily imply an annulment of a norm and invalidation of all legal results emanating from that action. Instead, it grants the discretion to the constitutional court to set up the date, when the norm is to be considered null and void.

With respect to General Courts' final decisions, generally exceptions are found in criminal cases, and in some occasions, in disciplinary and administrative cases, which is related to a person's responsibility. This is due to the fact that it is considered unjustifiable to put the responsibility upon a person and to prolong this liability even after the declaration of the rule, under which the person was imposed with this responsibility, has been declared as unconstitutional. It is well illustrated by the models of Portugal and Spain, which in my opinion, should be taken into account in our reality too.

It is also noteworthy that the issue of temporal effects of the constitutional court's decision usually is less topical in most European systems of constitutional review (accordingly, the current Case- Law of the constitutional Court, in this regard, is also quite scarce), since the constitutional courts have an opportunity to evaluate in the context of constitutionality not only statutes, but also the judicial decisions and / or individual administrative acts and actions of the public authorities. Accordingly, in such jurisdictions retroactive effect is less needed, because other existing mechanisms enable individuals to redress their violated rights. However, as shown in examples of Portugal, Germany, Spain and Belgium, even in such jurisdictions, constitutional courts have discretion to apply a retroactive effect, which creates one of the most important mechanisms for the protection and restoration of human rights.

7. GRANTING THE RETROACTIVE EFFECT FROM THE "PURELY LEGAL" POINT OF VIEW

Hans Kelsen also does not exclude a retroactive effect of constitutional court's decision. In his work – "Pure Theory of Law", he talks about creating a specific body which can enforce constitutional control and its authority to annul an unconstitutional norm. Although Kelsen's theory is completely devoid of political, moral and value discussions and is based on purely positivist approach, he does not rule out that the constitutional court's decision can have a retroactive effect, that is, can have effect to the past and to annul those legal results, which in fact, were stipulated by an unconstitutional norm⁴⁴.

⁴⁴ Kelsen H., Pure Theory of Law, Translated by M. Knight, Berkeley and Los Angeles, 1967, p. 277. [Kelsen].

Kelsen excludes an existence of a law that is null and void. In his opinion hereafter this, the law can become unconstitutional, as it is illogical and there is not the law without legal effect. It can only be annulable, invalid in various degrees. In this regard, for Kelsen, nullity is the highest degree of annullability⁴⁵.

Kelsen states that the declaration of a norm's nullity is formally incorrect; however, he does not preclude those consequences that come after nullification of a norm, which means that the decisions and legal effects based on a norm can be invalidated. The motivation, which Kelsen sets out in here, is very important. In particular, legal system, from his perspective, is unable to determine under which conditions the norm might be null from the beginning. For this reason, nullification of a norm does not happen *a priori*, but constitutional court *postfactum* sets special conditions and carries out their assessment based on them. Since the establishment of preconditions for the norm's assessment occurs *post factum*; in this context we also get retroactive effect. Establishment of these preconditions, in Kelsen's opinion, has constitutive meaning. Therefore, declaration of nullity of a statute is incorrect. Thus, a statute is to be abolished not for the fact that it had no legal effect from the beginning, but due to the fact that it was ascertained as unconstitutional as a result of judicial criteria⁴⁶. Hence, in each case, the court evaluates a statute in relation to particular prerequisites, after which, actually the selective process is used to decide the time, when a norm can be considered unconstitutional and thus, in some cases, giving a retroactive effect to a decision is not ruled out.

So, by virtue of the legal order, Kelsen has explained quite logically an expedience of his thesis. It also should be underlined, that constitutional review in Kelsen's theory is associated only with its formal approach. In other words, an assessment of to what extent the law complies with the special conditions, set out in the Constitution, and if it does not concern its content, that is, human rights. However, Kelsen himself, does not preclude that a constitution can provide for human rights and to have even moral content. Consequently, from my perspective, proceeding from Kelsen's reasoning, retroactivity of judicial decisions would not be impossible for him, if he had to discuss the topic from the standpoint of human rights. Therefore, granting a retroactive effect to the constitutional court's decision, in itself, does not create any problems in the sphere of legal Theory and is permitted.

8. CONCLUSION

This article has discussed the issue of retroactive effect of the decisions of the Constitutional Court and came to a conclusion that the current mechanism of constitutional review in Georgia in terms of

⁴⁵ *ibid.* pp. 277, 278.

⁴⁶ *ibid.*

human rights protection is inefficient and needs to be amended. Nevertheless, it does not imply qualitative changes in the present mechanism but even under the current model it is possible to take an important step towards improvement of the mechanism by giving the discretion to the Constitutional Court. As a result, this will ensure the establishment of an effective domestic remedy, in the form of the Constitutional Court, for the protection of human rights.

The main thesis of this work – conferring the retroactive effect on judicial decisions, was enhanced with some significant arguments including the scopes, under which the Constitutional Court will be given the discretion to use the retroactive effect. This is the case, when a statute, recognized as unconstitutional, implies to imposing the responsibility on a person or inflicting damages upon the person through a state’s action, based on the same statute.

As the experience of other countries have demonstrated, such scale of giving the retroactive effect is allowed and applicable, including such jurisdictions, where constitutional courts have large powers and therefore, there are multiple possibilities of human rights protection. At the same time, as we have already discussed on the basis of Hans Kelsen’s work, an application of retroactive effect is also allowed in the theory of “Pure Law”.

Besides aforementioned, it is noteworthy that according to the opinion of the Venice Commission, before the European Court of Human Rights, as a mechanism of effective domestic remedy is mainly considered those constitutional courts, where a full constitutional complaint mechanism exists. Such countries have a lower number of complaints before the European Court of Human Rights than others⁴⁷. Accordingly, if the current model of the constitutional review in Georgia is refined and Constitutional Court of Georgia is deemed as an effective domestic remedy, it will ensure that the solution of the cases related to Human Rights violations will become even more intensive at a national level, which will reduce the need to apply to the European Court of Human Rights.

To summarize, granting additional powers to the constitutional court is an important prerequisite for achieving the abovementioned objectives and creating effective mechanisms for human rights protection at a national level.

⁴⁷ Venice Commission, 5 par.5.