

# Execution of Constitutional Court Decisions in Georgia: Legislative Framework and Practice

George Papuashvili

**Report prepared for the** online international Seminar - "Execution of the decisions of the Constitutional Courts and equivalent bodies: theory and practice" organized by the Venice Commission in cooperation with the Constitutional Council of the Republic of Kazakhstan on June 25, 2012

The effectiveness of the constitutional review is largely predicated upon the form, scope and nature of the execution of constitutional decisions. For an individual filing a constitutional complaint it is vital to be able to get an effective remedy from the constitutional court. Thus, effective implementation of constitutional decisions carries a crucial role in upholding the supremacy of the Constitution and the Rule of Law. The Constitutional Court of Georgia similarly to the courts of other new democracies has experienced important challenges related to the adjudication process, execution and comprehension of its judgments. Nevertheless, even in a relatively short period of its existence, the Court has been able to develop the case law, including novel interpretative instruments to eliminate factors impeding the Court's ability to effectively exercise its mandate.

According to the Constitution of Georgia (Article 60.5), "A judgment of the Constitutional Court shall be final. An act or a part thereof that has been recognised as unconstitutional shall cease to have legal effect as soon as the respective judgment of the Constitutional Court is made public, unless the relevant judgment envisages a later time frame for invalidating the act or a part thereof".

This provision in principle means that once the judgement of the Constitutional Court is pronounced in public, the unconstitutional norm loses its force immediately provided the Court does not indicate *pro futuro* effect thereof (meaning the unconstitutional norm(s) to be invalidated at some later date in future).

## ***Temporal Effects of Constitutional Court Decisions***

With regard to the effects of constitutional courts acts (which annuls a legal norm) upon the various fields of law, there is not a uniform approach in the Georgian legislation. It is important to make distinction between different fields of law, namely civil, criminal and administrative law. With respect to the criminal cases, the legislation does have the answer as it provides for redress (reopening of a case; retrial) if the disputed provision upon which the case in a criminal court had been decided is found unconstitutional.

In administrative and civil cases, nonetheless, there are no clear-cut solutions, as relevant legislation does not regulate the issue. Yet, in administrative cases the judicial practice in Georgia (both ordinary courts and the constitutional court) tend to recognise the importance of an effective mechanism whereby the flawed legal norm has caused a damage to the party in question and the responsibility of the state is involved. Civil

procedure however does not recognise the possibility to reopen a case if such a case had been decided in the past based on an unconstitutional norm.

Interestingly, there are number of cases pending before the Constitutional Court requesting the court to rule on the effects of its acts in the civil proceedings. The question in a nutshell for the court is to determine the boundaries of decision-making by either acknowledging ex post facto effect of its decisions in civil cases or denying the complaint. The arguments for upholding the claim refer to the principle of supremacy of the constitution, whereby already decided civil cases, which in fact may still have significant implications to the party in question, need to be reopened if it is declared by the Constitutional Court that they were based on an unconstitutional legal norm. On the other hand, the avoidance of disorder in the whole legal system gains relevance, because in case all the previously decided civil cases become eligible for reconsideration, the principle of legal certainty may suffer (principle of *res judicata* – finality of judgments).

In its amicus brief written upon the request of the Constitutional Court of Georgia, the Venice Commission notes that one of the inherent characteristics of the rule of law is the principle of legal certainty and the protection of citizens' trust in the law, which includes the prohibition of retroactive effects of legal regulations and their provisions.<sup>1</sup> Conversely, effectiveness of constitutional review mechanism needs to be ensured. On the whole, in choosing a system of effects of constitutional court decisions, a balance must be found between the principles of individual remedy on the one hand and legal certainty on the other.

In systems that provide for a normative constitutional complaint, the individual act applying the normative act cannot be attacked as such before the constitutional court. The control by the constitutional court does not concern the implementation of the normative act. As a consequence, a normative constitutional complaint is not an effective remedy if the unconstitutionality resides in the application of the norm, but not in the norm itself.

As concerns the validity of the unconstitutional legal provisions, there are two schools of thought: 1. unconstitutionality 'as from then' (ex tunc) effect; 2. unconstitutionality 'as from now' (ex nunc) effect.

Only relatively few countries provide for ex tunc effect of constitutional court decisions. The German legal system is widely regarded as a well-known example for an ex tunc. In this case, ex tunc means that the unconstitutional provisions are considered to be invalid as from their adoption. The decision of the constitutional court finding the unconstitutionality is not a constitutive act invalidating these provisions. It only identifies provisions which are unconstitutional and which are already invalid. The advantage of this concept is its abstract clarity. The supremacy of the Constitution is regarded so important that unconstitutional provisions are invalid per se.

---

<sup>1</sup> CDL-AD(2018)012-e Georgia - Amicus curiae brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)012-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)012-e)

However, in practice, a rigorous application of this concept would lead to unforeseeable results in individual cases, which are based on the application of the unconstitutional provision. For instance, a decision finding a provision on marriage unconstitutional (for instance because of a contradiction with the principle of equality) would then result in the invalidity of all marriages concluded under this provision. This is, of course, an unacceptable result for society. Therefore, even in states with ex nunc effects on the law itself, these effects are regularly excluded for final judgments that do not lose their legal force.

The alternative model of invalidating unconstitutional provisions ex nunc is the most common. In its strict form, this means that the legal provision that was found unconstitutional remains even applicable to facts that arose before the invalidation entered into force. With the exception of the rule for the instant case (preferential treatment of retroactive effect of the decision applying only to the complainant; *Ergreiferprämie* in German), decisions of the constitutional court do not influence legal relationships that had been finalised before the publication of the decision. The logic justifying this solution is that legal certainty is given a high priority over individual remedy. In order to provide a remedy in the case which led to the decision of the constitutional court, the rule for the instant case is necessary as an incentive for individuals to appeal to the constitutional court.

The Austrian Constitution established a system of a strict ex nunc system with a rule for the instant case. Article 140 para. 7 of the Federal Constitutional Law stipulates that the law invalidated by the Constitutional Court shall continue to apply to the circumstances effected before the decision of the Court, with the exception of the instant case. The Court may, however, extend the effect of its decision to parallel cases pending before courts or administrative authorities at a certain point in time.

In some countries, the constitutional court itself may decide on the effects of a decision finding a legal provision unconstitutional. In the Czech Republic, there is extensive case law on the issue of legal aspects of abstract constitutionality review. Findings of the Constitutional Court are considered constitutive legal acts and have, in principle, ex nunc effects. However, in exceptional cases, the Constitutional Court's findings have retroactive effects. They are admissible if they are absolutely necessary as a last resort for the purposes of protection of constitutionality and if they do not lead to disproportionate interference in legal certainty, especially in vertical relations if the unconstitutional provision regulates the relationship between a public authority and an individual who would benefit from the invalidation.<sup>2</sup>

The case-law of the Constitutional Court of the Czech Republic admits that when it comes to vertical relationships (between the state and individuals), a finding of unconstitutionality may have retroactive effects, because in vertical relationships it is necessary to give priority to the protection of fundamental rights over legal certainty and trust in the law.<sup>3</sup>

---

<sup>2</sup> Finding of the Constitutional Court of the Czech Republic ref. Pl. ÚS 55/10 of 1 March 2011.

<sup>3</sup> Finding of the Constitutional Court of the Czech Republic ref. Pl. ÚS 38/06 of 6 February 2007.

Interestingly, Armenian law provides that the decisions of the Constitutional Court have a retrospective effect on all ordinary court judgments and administrative decisions taken during the last three years before the entry into force of the decision of the Constitutional Court.

In addition, the Constitutional Court of Moldova struck down the procedural law that precluded reopening of civil cases by virtue of unconstitutionality of applicable law. The Court indicated that the legislation needs to strike a fair balance between the principles of individual remedy and legal stability by introducing a legislative time limit, during which the reopening of civil cases will be allowed for the affected third parties.<sup>4</sup>

The Venice Commission showed a slight preference for a combination of a system of invalidation *ex nunc* (including a special rule for the instant case), together with the possibility for the constitutional court to order a retroactive effect if this is required, under certain conditions. In one of its opinion, it is stated that “[a] general retroactive effect should be avoided as this could have “very costly and negative effects (also on third parties)” and “It seems safer to have a general *ex nunc* effect with the exception of the petitioner who should benefit respective effects of an individual complaint to the Court.”<sup>5</sup> Such a system would give the constitutional court enough flexibility to establish a balance between the principles of individual remedy and legal certainty. However, such a preference does not mean that other systems are not in line with European standards. from the complaint and to leave the determination of possible ret

### ***Constitutional Proceedings: Interim Measure and Summary Proceedings***

In order to ensure effective protection of human rights merely equipping the constitutional court with competences to declare provisions unconstitutional is not sufficient. In order to be able to completely exercise its mandate, the Constitutional Court needs to have a flexible legal mechanism of adoption of the judgments as well as instruments for their implementation without the involvement of legislative branch. The Court has taken steps for increasing its efficiency in both directions.

In Georgia constitutional proceedings are regulated by the law. Thus, in theory, legislator is equipped to create unnecessary obstacles on decision-making process of the Court. However, in several cases the Constitutional Court of Georgia as a “negative legislator” has already adjudicated on the constitutionality of the provisions regulating its proceedings and has annulled certain clauses. For instance, the Court has declared the provision restricting the foreigner to apply to the Court void and ruled that any individual and legal person is entitled to lodge a constitutional complaint; thus, broadening the scope of persons that can file a case to the Court (public defender against the parliament of Georgia, 2010)<sup>6</sup>.

---

<sup>4</sup> Judgment N 16 от 25.06.2013, available in Russian at: <http://lex.justice.md/ru/349150/>

<sup>5</sup> Opinion No. 479/2008 on the Draft Law of the Constitutional Court of Montenegro, CDL-AD(2008)030.

<sup>6</sup> <https://www.constcourt.ge/ka/judicial-acts?legal=542>

The Court has also ruled on the constitutionality of the regulations regarding the adoption of the judgment and declared that simple majority of the judges hearing the case is sufficient for upholding the constitutional complaint, removing yet another obstacle in the decision-making process like it was done in Poland (Bakradze, Ratiani and others against Parliament of Georgia, 2016)<sup>7</sup>.

Another provision the Court has declared void was an impediment of using the interim measures during the proceedings. According to the Law - If the Constitutional Court considers that the operation of a normative act may have irreparable consequences for one of the parties, it may suspend the validity of the disputed act or its relevant part until a final decision or for a shorter period<sup>8</sup>. The Court has found that its ability to suspend application of the provision, as an interim measure, is derived directly from the Constitution and is not specifically stated in the text. The interim measure can be used at any stage of the proceedings, either by the Chamber or the Plenum of the Court. The Constitutional Court, in its case of 2014 (NGO EMC and V.Menabde against parliament of Georgia)<sup>9</sup>, has invalidated the legislative norm that set a limit of maximum of 45 days after which the suspension of a legal norm in question would become ineffective. So, the Court had to issue a final decision on the case where it suspended the impugned legal norm within 45 days, which rendered the Constitutional Court ineffective remedy and was found by the Constitutional Court of Georgia to be in contradiction with the constitutional right to a fair trial.

In addition, the Constitutional Court declared the rule set out in the Article 29.4 of LCLP (Law on Constitutional Legal Proceedings) unconstitutional, which required the Constitutional Court to announce the full text of its decision in the courtroom (Bakradze, Ratiani and others against Parliament of Georgia, 2016)<sup>10</sup>. The Constitutional Court indicated that the disputed norm prevents the decision of the Constitutional Court from entering into force in an unjustified and unreasonable manner and thereby puts it at odds with the right of an individual to timely administration of constitutional justice.

### ***To preclude adoption of the similar unconstitutional provisions***

The judgment of the Constitutional Court of Georgia not only declares the provision unconstitutional, but also determines the scope and meaning behind the constitutional provision. Therefore, the ruling by the Court precludes the adoption of legislation with similar restrictions on the decision-making process of the Constitutional Court. When a new case is brought against a norm with the same content as one that was already found unconstitutional, the case is to be declared inadmissible and the challenged provision is declared unconstitutional.

The legislation empowers the Court to pursue a case on summary proceedings, whereby the subject matter in question – a substance of the legal regulation – has already been found unconstitutional by the court before. Accordingly, at this stage the task of the Constitutional Court is to identify whether the disputed provision entails the

---

<sup>7</sup> <https://www.constcourt.ge/ka/judicial-acts?legal=1141>

<sup>8</sup> Article 25.5 of the Organic Law “on The Constitutional Court of Georgia.

<sup>9</sup> <https://www.constcourt.ge/ka/judicial-acts?legal=1070>

<sup>10</sup> <https://www.constcourt.ge/ka/judicial-acts?legal=1141>

very same content of the older unconstitutional regulation. In case the Constitutional Court sees the legal provision in question as the identical to the already annulled legal norm, it is going to issue a ruling, thereby rejecting the case on the merits but finding the disputed regulation unconstitutional.

### ***Concept of 'Normative Content' and interrelation with the Ordinary Courts***

Per its case law, the Constitutional Court of Georgia comprehends the significance of effective application of constitutional standards established by the Court in individual cases. The provision(s) declared unconstitutional by the Constitutional Court lose legal force once the Court officially publishes the decision. However, since the Constitutional Court of Georgia has the authority to rule on constitutionality of the normative act only, the judgment does not have instant result on individual cases. The Constitutional Court serves as a negative legislator; it invalidates unconstitutional normative acts; however, the application of a new normative reality in individual cases is up to the general courts. Thereby, they serve as the enforcer of the constitutional case law in practice. The general courts are guarantors for effectiveness of the decisions of the Constitutional Court; therefore, clear understanding and institutional dialogue between these courts is imperative for the effectiveness of constitutional control in the Georgian legal system.

It is noteworthy in this respect that the Constitutional Court of Georgia has developed the notion of “normative content” of the provision. After developing the mentioned notion, the Constitutional Court can evaluate constitutionality of only the normative meaning of the provision that is problematic for the complainant. The idea of “normative content” is based on a simple assumption that the provision is not merely the text written on a paper but its substance, actual regulation (a set of rules) established by it. It thus follows that formally, single text of a legal provision could have several normative meanings; it could be regulating different relationships, out of which only some might be challenged. Therefore, the Court has developed the case law to the point where it is now authorised to separate different normative meanings from the same text and if only some are problematic, declare them unconstitutional without invalidating remaining normative substance of the provision.

By introducing the mentioned notion, the Constitutional Court is enabled to rule on more specific issues, making it easier to settle an actual problem identified by the complainant. It is one of the most effective ways to evaluate constitutionality of the interpretation of the law made by the general courts within the competence of normative control. Thus, evaluating the constitutionality of the problematic normative meaning of the provision has allowed the Constitutional Court of Georgia to make efforts towards becoming almost as effective as the Constitutional Courts, which have the competence to review constitutionality of the judgment of the general courts.

The execution of standards of the Constitutional Court in actual cases, as noted above, is up to the common courts. The general courts interpret and apply the laws adopted by lawmakers, while the Constitutional Court rules on compatibility of the law with the Constitution. However, the division of competences is not always that simple; in order to check constitutionality of a provision, the Constitutional Court is in need to interpret the disputed law, determine its meaning and then, by elaborating on the latter, evaluate its constitutionality. The issue becomes complicated in cases when the interpretation of

a disputed vague legal provision made by the Constitutional Court does not match to interpretation made by the general courts. In such cases, the Constitutional Court faces a dilemma of whether it should interpret the law as it considers to be correct, or to take interpretation made by general courts as a guiding source of finding true meaning behind the legal provisions.

During the past 15 years, the Constitutional Court of Georgia has gradually developed extensive case law on the mentioned issue. In the early cases, the Constitutional Court used to interpret the disputed legal provisions independently, by taking judicial practice of its application into consideration, but did not entirely rely on it. In the Judgment N1/3/407 of 26 December 2007, the Constitutional Court indicated that the constitutional application of the disputed provision in practice could be a signal of its constitutionality, but cannot entirely prove it. The real meaning of the law should be determined by its interpretation via using interpretative methods to determine its purpose and essence. In this case the Court established the test for evaluating vague legislation and emphasised that if the interpretation of a legal provision in good faith leads to its several meanings, one of which is unconstitutional, the disputed provision has to be declared unconstitutional.

In the early case-law, there were occasions when the Constitutional Court ruled that the problem identified by the claimant was a result of incorrect interpretation of the disputed provision. Such interpretation made by a general court could not provide the ground for its unconstitutionality. Although in theory this approach may be correct, in practice it could be problematic. As I have already indicated, the judiciary in Georgia consists of two separate court systems, whereby no superiority is established in the law. It thus follows that the general courts do not have the obligation to follow the interpretation of laws made by the Constitutional Court, nor is there the enforcement mechanism for it since the Constitutional Court is not authorised to review judgments of general courts. Therefore, if general courts maintain the interpretation, which is not shared by the Constitutional Court, such meaning of a legal provision stays outside of the scope of constitutional control, which may well hinder its effectiveness and harm supremacy of the Constitution.

Due to the foregoing, the approach of the Constitutional Court has changed gradually. The change was formally declared by the Constitutional Court in its Judgment N1/2/552 of 4 March 4 2015, the Constitutional Court indicated that “the general courts, within the scope of their competency, deliver a final decision on normative content of the law, on its practical application and therefore on its enforcement. Consequently, the interpretation of the legal norms made by the general courts has huge importance for determining real content of the law. As a general rule, the Constitutional Court considers and assesses a legal provision with the same normative content as it was applied by a general court” (II-16). By this statement, the Constitutional Court underlined that, in principle, it will understand the meaning of a legal provision as is interpreted by the general courts. However, in the same judgment the Constitutional Court indicated that in several exceptional cases it is authorised not to follow the general courts’ interpretation. For example, when the Constitutional Court is certain that the interpretation of the law made by the same instance courts are contradictory, the content of the provision be deemed to be ultimately defined by the general courts. Besides, in exceptional cases, the Constitutional Court is also authorised not to agree

with the interpretation of the provision made by the general court if it is clearly unreasonable.

The mentioned approach is an important step forward for increasing effectiveness of constitutional control enabling the Constitutional Court to have effect on individual cases decided by the general court via evaluating the constitutionality of the law as it is applied in practice. Furthermore, it helps to define a clear line between the competencies of two separate systems within the judiciary, by declaring that the interpretation of laws and determining its content is the mandate of the general courts, and the Supreme Court of Georgia has a final say on this issue, while the Constitutional Court rules on the compatibility of such normative content with the Constitution.

It can be said that Constitutional Court's novel interpretative approach helps to ensure the Constitutional Court decisions in Georgia are effectively enforceable in practice, and individuals affected are better equipped to get a proper redress in ordinary courts. It also illustrates evolution of the constitutional case law in Georgia in a way as to provide viable normative framework for interaction between the Constitutional Court and ordinary judiciary in order to bring the constitutional provisions closer to actual cases, as well as increase effectiveness and consistency within national legal order.

The correct comprehension of the constitutional standards by interested parties is also very crucial for effective protection of human right in Georgia. Misinterpreting the court judgment might lead to ambiguity and harmful application of judgment as well as damage to the authority of the Court. Therefore, the representatives of the Constitutional Court of Georgia regularly participate in public discussions organized around the judgment. The Court regularly meets with representatives from NGOs and media to discuss new developments in the case law. The work of the Court as well as the development of legal culture and education in Georgia has led to dramatic increase of interest toward the Court. The number of Constitutional complaints as well as judgments delivered by the Court increases annually, evidencing the need and benefits of further dialogue with the stakeholders.

In short, I believe it is fair to note that although some challenges were experienced at different stages of functioning of the Constitutional Court of Georgia, the Court has been able to successfully cope with these challenges and has managed to emerge as a strong institution of constitutional justice, serving as an effective mechanism for the protection of human rights and freedoms in Georgia.