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THE REMEDIES OF ELIMINATION OF A STATUTORY PRIVILEGE INCOMPATIBLE WITH THE RIGHT TO EQUALITY AND NON-DISCRIMINATION BY THE CONSTITUTIONAL COURTS

ABSTRACT

While performing the constitutional review, constitutional courts often have to assess the constitutionality of legal provisions, which grant a privilege concerning social benefits, tax exemptions or similar matters to a certain group of the society. Such cases can be problematic with regard to the right to equality when a particular group of people are excluded from above-mentioned privileges without appropriate rational justification. The main challenge for constitutional courts in these cases is to declare the provision granting a privilege unconstitutional in such manner, that does not go beyond the scope of its authority and role as a negative legislator. To resolve this issue, constitutional courts apply various mechanisms established by the relevant legislation or the case law and the Constitutional Court of Georgia is no exception for that matter.

INTRODUCTION

People tend to be particularly susceptible to discriminatory regulations. Therefore, application to the constitutional courts on the ground of violation of the right to equality is frequent.[1] While applying to the court, a complainant's desirable outcome is obvious – to fully ensure the equality before that law, meaning to extend a privilege granted by the legislator to a certain category of people on a complainant too. However, in some cases, the actual outcome of the judgment, concerning a complainant's case does not fully reflect his motivation/wishes and is a reason/basis for his/her dissatisfaction. According to the Austrian model of constitutional review, the constitutional court is a negative legislator, which means that it's entitled to discuss discrim-

[1] For example, according to the statistics published on the website of the Constitutional Court of Georgia, for 1996-2017 years, assessment the constitutionality of impugned provision was one of the most frequently requested with respect to the right to equality.

inatory nature of the law, but it lacks the authority to restore equality between persons, by extending a privilege granted to a certain group to all, including a complainant. Though it is not the sole solution to the abovementioned legal dilemma. In some jurisdictions, constitutional courts have the authority to comprise the role of a positive legislator. Namely, while assessing a possibly discriminatory nature of a disputed provision, courts are able to grant a preferred privilege to a complainant by expending the group of those who were already eligible for receiving such privilege according to the disputed provision.

"Citizen of Georgia Lali Lazarashvili v. The parliament of Georgia" became an important precedent, a turning point in the case law of the Constitutional Court of Georgia since the Court had to define the scope of its authority concerning with discriminatory nature of legal provisions granting a privilege to a certain group of society.[2] But Georgia was not the exception, as constitutional courts of other jurisdictions faced a similar challenge. Consequently, such challenges laid a ground for introducing various legal techniques for solving the above-mentioned important legal dilemma.

This paper is dedicated to identification of the legal dilemmas concerning the elimination of a statutory privilege incompatible with the equality and non-discrimination and its remedies. Furthermore, the paper deals with the comparative analysis of appropriate models from different jurisdictions and the relevant case law of the Constitutional Court of Georgia.

I. Problems with the Elimination of a Statutory Privilege Incompatible with the Equality before the Law

There are two types of legislative omissions in legal doctrine - absolute and relative. Absolute omission means that there is no statutory regulation to enforce a constitutional provision, whereas in the case of relative omission, a regulation exists, but it is incomplete. Thus, absolute omission is related to "silence of the legislator" whereas the case of relative omission deals with "silence of the law". Eventually, both cases create an unconstitutional situation.[3]

A particular case of relative omission is a statutory provision, which grants a privilege to only a certain group of people. These types of regulations directly refer to the particular beneficiaries of a privilege while remaining "silent" towards others. In this case, while assessing the discriminatory nature of such provisions, it is only unconstitutional to exclude certain group of individuals from granting a privilege [without proper constitutional justification] (it is not problematic itself to grant a privilege to a particular group).[4]

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[2] Citizen of Georgia Lali Lazarashvili v. the Parliament of Georgia judgement 3/6/642, the Constitutional Court of Georgia, November 10, 2017.
[3] Allan R. Brewer-Carías ed., *Constitutional Courts as Positive Legislator, A Comparative Law Study,* Cambridge University Press, 2011. pp.125-126.
[4] Werner Heun,*Verfassung und Verfassungsgerichtsbarkeit im Vergleich*, Mohr Siebeck , 2014. p. 206.

Constitutionality of statutory provisions, which grant a privilege to a certain group of society, may be assessed with regard to the particular substantive constitutional right as well as to equality before the law. Nevertheless, it is the latter that is rather interesting for the purposes of this paper. Normally, establishing the discriminatory nature of such regulation is not particularly problematic itself, but the challenge mainly concerns articulating the legal outcome in a manner that enables the court to stay in the role of a negative legislator.

The Constitution of Georgia establishes the fundamental constitutional principle of equality before the law. As the Constitutional Court of Georgia has defined "limitation of the right of equality will take place only if it is obvious that essentially equal individuals are treated unequally (or essentially unequal individuals are treated equally)".[5] In addition, differential treatment is not *a priori* considered to be a discriminatory treatment. "[…] [D]iscrimination will take place, if the reasons for differentiation are unexplained and lacked reasonable grounds".[6] Thus, any regulation, which treats equal people with respect to a specific legal relationship unequally without proper justification, violates the principle of equality.

Generally speaking, while adjudicating on the discriminatory nature and constitutionality of regulations granting a statutory privilege to a certain group of the society, equality before the law can be ensured by two different outcomes: extending such privilege on the whole society or annulling it altogether for everyone. While choosing from these two opposite options the central matter of discussion becomes the separation of powers between the legislator and the constitutional court.

In constitutionalism, constitutional courts are generally considered to be negative legislators since their "primal authority is to ensure that existing national legislation is compatible with the constitution/constitutional requirements".[7] "The Court's authority is bound to invalidate the already existing legal provisions which violate the requirements of the Constitution and it is beyond the court's constitutional mandate to adopt a different regulation, even if it is fully compatible with the Constitution".[8] Therefore, the constitutional courts are unable to ensure equality before the law by granting a privilege to people beyond the group defined by the disputed provision. It is undoubtedly the exclusive part of legislative authority.

As mentioned above, another possible outcome of declaring a discriminatory statutory provision granting a privilege to a certain group of the society unconstitutional is by invalidating it in such a manner that barres anyone from getting such entitlement and thereby ensures the equality of

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[5] Citizens of Georgia – Levan Asatiani, Irakli Vatcharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze v. the Ministry of Labour, Health and Social Affairs of Georgia judgement 2/1/536, the Constitutional Court of Georgia, February 4, 2014. Paragraph II-10.

[6] Political Unions of Citizens "New Rights" and "Conservative Party of Georgia" v. the Parliament of Georgia judgment 1/1/493, the Constitutional Court of Georgia, December 27, 2010. Paragraph II-3.

[7] Citizen of Georgia Lali Lazarashvili v. the Parliament of Georgia judgement 3/6/642, the Constitutional Court of Georgia, November 10, 2017. Paragraph II-10.

[8] *ibid*.

all. But this possible legal solution is also considered the sign of an excessive authority of a court by some.[9] In particular, it is pointed out that correction/reform of discriminatory nature of statutory provisions granting a privilege to some and bringing them into harmony with the constitution is achievable by several alternative ways. Namely, a privilege can be granted to all by expanding the group of people who were initially entitled to get it by the disputed provision or a privileged group of the society can be stripped off such privilege and a new law can be adopted for both groups (for privileged and non-privileged).[10] Therefore, as the legislator undoubtedly has various options for making disputed regulations in compliance with the constitution, it is argued that considering the principle of separation of powers, constitutional courts should show some institutional respect and "clear the arena" for the legislative branch for creating the new order.

It should be noted, that the case law of constitutional courts in different jurisdictions is not uniform concerning the abovementioned matter. Some courts declare a regulation granting a privilege for a certain group fully unconstitutional, while others invalidate a part of the disputed provision, so that the circle of groups, entitled to such advantage, expands. Moreover, in some jurisdictions, statutory regulations providing a privilege are declared as incompatible with the constitution without their invalidation. In such cases, in order to eliminate the unconstitutional situation, constitutional courts issue guidelines and instructions for the legislator and, thereby, determine its future actions.[11]

It should be emphasised that the abovementioned reasoning concerns the regulations that in a discriminatory manner grant a privilege not a right to a certain group. In other words, an entitlement that is given to such group is a statutory privilege, not a substantive right guaranteed by the constitution. Therefore, the legislator will not violate the supreme law by refusing to grant such privilege to anyone. The only guarantee the constitution considers for the latter is that a regulation granting a privilege should be in full compliance with the right to equality. But it is a different scenario when an entitlement given to only a certain group is guaranteed to all by the substantive constitutional right. In so far as the supreme law is the basis for such entitlement, the legislator cannot determine its beneficiaries in different manner by the ordinary law. Such regulation would be not only contrary to the equality but to the substantive guarantees prescribed by the constitution itself. In conclusion, these two scenarios create different legal consequences and, therefore, different methods to eliminate discrimination are needed. For more clarity, it is convenient to refer to the relevant case law.

The Federal Supreme Court of Switzerland delivered the judgment regarding the discrimination in suffrage based on sex. More specifically, the Constitution of Canton of Appenzell Innerrhoden allowed only men to participate and vote in parliamentary elections of the canton

[9] Werner Heun, *supra* note 4, p. 206.
[10] Pieroth/Schlink, *Grundrechte Staatsrecht II*, 23., neu bearbeitete Auflage, C.F. Müller, 2007. p. 116.
[11] Allan R. Brewer-Carías, *supra* note 3, p. 149.

(*Landsgemeinde*). Federal Supreme Court held that such normative order violated the right to equality among men and women and it granted the right to vote to women too.[12] In the Swiss National Report Zurich University Professor Tobias Jaag indicated that the suffrage granted to women by the Court is an example of the judiciary being a positive legislator.[13] This position cannot be shared due to several reasons. Namely, when assessing the discriminatory nature of the regulation granting a statutory privilege, the constitutional court, may deprive the privileged group of their right to receive benefit or extend such group of beneficiaries (some constitutional courts also apply this means, but it's not shared by the author of the article) or create a mechanism that will give the legislator a reasonable time to choose from alternative constitutional solutions and ensure equality. However, while assessing the discriminatory nature of the provision regulating enjoyment of a particular substantive constitutional right (discrimination in constitutional right), a constitutional court does not have a freedom to apply all of abovementioned methods, since the court does not have the authority to deprive someone of his constitutionally guaranteed substantial rights. A constitutional court cannot invalidate discriminatory provisions which let only a certain group enjoy their constitutional rights as well as it cannot postpone the invalidation of discriminatory provisions, which allows the legislator to ensure equality on its own. When a court establishes that "privilege imposed by law" is also a constitutional right, its constitutional duty is to grant everyone the equal opportunity to enjoy such right by its judgment. Therefore, a court's refusal to grant an entitlement recognised by the constitution to everybody is not an example of it acting within its competence, but an example of its refusal to fulfil its mandate. Similarly, unlike a privilege created by the law, conferring constitutional right is a case, when the legislator has no freedom of action. It lacks the authority to choose from several alternative solutions and the sole solution in compliance with the Constitution is "granting" a constitutional right to its subject. Constitution is the legal basis of a constitutional right. Constitutional rights are directly applicable law and they exist/operate independently without additional regulation adopted by legislator. Therefore, a reason for passivity of a constitutional court and its willingness of entrusting legislator with making of such decision, is ill-founded.

From the perspective of effective protection of fundamental human rights, it is unreasonable to fully block the judicial branch from the authority to modify disputed regulations in order to ensure their compliance with the constitution. Nevertheless, having such authority can only be justified when the only way to restore the constitutional *status quo* is to modify the impugned regulation with addition of new normative content, namely, when the subject of dispute is substantive constitutional right, including, discrimination in substantive constitutional right.

As noted, the abovementioned scenario is to some extent different from the case when the disputed provision grants a statutory privilege (not a substantive right) to a certain group in a dis-

[12] Tobias Jaag, *Swiss National Report*, in book Allan R. Brewer-Carías, *supra* note 3, p.794.
[13] *ibid*.

criminatory manner. In such situation, there is not one, but several ways of how disputed provision can be made compatible with the constitution and choosing one goes beyond the authority of the judicial branch and interferes with the authority of the legislator. Therefore, with keeping in mind the mandate of constitutional review authorities and constitutional rights being directly applicable law, whenever a constitutional court deals with a disputed provision "granting" particular substantive right (not only a statutory privilege) in a discriminatory manner, modifying such provision and expanding the group of "beneficiaries" by restoring them in their fundamental rights should be the solution compatible with the constitutional requirements.

Along with the substantive solutions of the above discussed legal dilemma, it is equally important to find and establish a proper "technical form" of judgments about discriminatory regulations concerning substantive constitutional rights. Some courts have found solution in abolishing only the normative content of such regulations instead of fully invalidating them so that every group is able to enjoy its substantive constitutional right, which some of them have been deprived of by the disputed regulations.[14] This is the model used by the Constitutional Court of Georgia in its case law. Namely, in one of the cases, complainants challenged the provision, which exhaustively defined the category of people whose general education were funded by the state. According to the Court's assessment, the impugned norm excluded the complainants - foreign citizens residing in Georgia, from the opportunity to receive such funding. According to the Court's judgement, funding general education of foreign citizens residing in Georgia was protected by the right to education guaranteed by the Constitution of Georgia and, accordingly, disputed provisions were declared unconstitutional with regard to the right to education. At the same time, the norms were assessed in relation to the right to equality and they were declared as discriminatory. Unlike other cases, in this case, the Court could not have completely abolished the impugned regulation (the persons mentioned in the impugned provisions could not be deprived of education funding), since, general education funded by the state was everybody's constitutional right. That is why, impugned regulation was invalidated with such normative content, that excluded foreign citizens residing in Georgia, from receiving such funding. As the result, the Court "granted" complainants the right to exercise their right to education and to get their general education funded by the state in a non-discriminatory manner.[15]

It is equally interesting to see the resolution of the case, where, according to the Court's assessment, the disputed provision granting a statutory privilege to a certain group, does not have a normative content of prohibiting others from receiving such benefit. In this case, the subject of the discrimination claim is to establish that granting a privilege to others is unconstitutional,

[14] In some cases, it may be disputed, if norms with the nature of entitlement, at the same time, have the right-restrictive content for others. Discussing this issue is not the purpose of the foregoing article. The author of the article is referring to case law, where norms with the nature of entitlement include such normative content (exclusion/prohibition of any privilege).

[15] Citizens of Russia – Oganes Darbinian, Rudolf Darbinian, Sussanna Jamkotsian and Citizens of Armenia – Milena Barseghian and Lena Barseghian v. the Parliament of Georgia judgement N2/3/540, September 12, 2014.

which is equivalent to deprive a privileged group of such entitlement. This formulation of a claim is admissible only with regard to norms granting a statutory privilege. But when the subject of the discrimination claim is the substantive constitutional right not just a statutory privilege, the complainant cannot argue about the constitutionality of others being able to enjoy their constitutional right but can argue on him/her not being able to do so. In such a case the court is left with the solution of invalidating the provision which has obligatory/prohibitory nature towards the complainant or invalidating the institution-setting provision.[16] Lastly, if the legislation does not contain either of these kinds of regulations, then invalidating the provision granting a privilege can be the effective remedy for protecting the complainant's rights.

II. Comparative Analysis of the Models for Eliminating Statutory Discriminatory Privileges

A. "Additive Decisions"

The case law of the constitutional courts has established the diversity of the Decisions of the judgments. One of such examples is "additive decisions". With such decisions the Court declares a provision of part thereof unconstitutional not on the grounds of the very wording being unconstitutional, but on the grounds that the disputed regulation is not faultless and needs "completing". Such decisions are mainly adopted for ensuring the right to equality by adding the provision to the disputed norm, which is "missing" or through making other type of amendment to it. In other words, with such decisions the constitutional court expands the normative content of the disputed provision.[17] It is recognised, that such decisions are contrary to Kelsenian Model, according to which the constitutional court should be a negative legislator.[18] Additionally, in this context the scope of action of the constitutional court should be taken into consideration. Specifically, through the "additive decisions" the discretionary evaluation system of the legislator is not being evaluated with regards to the disputed provision, since the constitutional court cannot interfere when there is one decision to be made out of multiple choices and, simultaneously, all of them are permissible. It is recognised, that in such instances, there is only the discretion of the legislator at hand. Therefore, if the constitutional court expands the scope of disputed provision or fully invalidates it and restores the equality of persons through one of these ways, the legislator can, with its discretionary powers and within the scope of ensuring the principle of equality, regulated this relationship differently and in this regard the judgment of

[16] Cases, where the Constitutional Court of Georgia has given the complaint similar instructions, may be applied by analogy. see, for example, Citizen of Georgia Giorgi Dgebuadze v. The Parliament of Georgia ruling №1/23/824, the Constitutional Court of Georgia, December 28, 2017. Paragraph II-6.

[17] Allan R. Brewer-Carías, *supra* note 3, pp. 80-81.

[18] Tania Groppi, *The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?*, 3, Journal of Comparative Law, 2008. p. 108.

the constitutional court (expansion of the circle of persons or invalidation of a privilege to all subjects) shall not be binding for the legislator.

The practice of "additive decisions" is characteristic to, including but not limited to, the Constitutional Tribunal of Spain. For instance, the Tribunal has adjudicated on the provision, according to which, in case of the death of a lessee, the rights and duties thereof are transferred to the spouse. The Tribunal considered such regulation discriminatory, since the provision excluded from the legal relationships the persons, who cohabited with the deceased within *more uxorio* the relationship similar to the matrimony. As a result of the judgment the disputed provision also expanded to the mentioned persons.[19] On January 14, 1993 the same Tribunal declared the rule unconstitutional with regards to the right to equality, according to which the social welfare pension was given to the daughters and sisters of the pensioner, while the sons and brothers were not capable of receiving such benefit. The Tribunal expanded the circle of persons and entitled the latter group the right to such benefit.[20] It can be stated, that when adjudicating mentioned decisions, the Spanish Constitutional Tribunal acted as a "real positive legislator". The model of "additive decisions" is also used by the Constitutional Tribunal of Portugal. For example, the Tribunal, with the Judgment N449/87 declared discriminatory the regulation, which envisaged different amount of allowance to the widows and widowers of the persons deceased by labour-related trauma. The Tribunal expanded the allowance existing for the widows to the widowers.[21] Similarly to the mentioned case, the Tribunal Judgment N359/91 considered contrary to the principle of equality the rule envisaged by the Civil Code, which provided for the transmission of a lessor status in the event of divorce and did not cover the *de facto* couples, who had an underaged child. In this Judgment the Tribunal issued an obligatory declaration and stated, that the disputed provision was unconstitutional as it caused the discrimination of children born beyond the matrimonial relationships.[22] The practice of "additive decisions" is followed by the Supreme Court of Canada and in some cases grants the disputed provision the content unforeseen by the legislator. The mentioned Court notes that it is entitled to define the means, which can most efficiently eliminate the discriminatory condition. Among such means is the transformation of the content of the law through adding a new rule to it. Additionally, before the Court expands the content of the disputed provision, it analyses/evaluated the factors, such as the accuracy and the clarity of the means chosen by the Court, the financial outcomes thereof, the impact of the selected measure to the legislative space and its relevance to the aims of the legislator.[23] The Constitutional Court of Hungary uses the so called "mosaic annulment"[24]

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[19] Judgment of the Constitutional Tribunal of Spain №222/1992, December 11, 1992. See F. Fernández Segado, *Spanish National Report*, in Allan R. Brewer-Carías ed., *supra* note 3, p. 83.
[20] Judgment of the Constitutional Tribunal of Spain №3/1993, January 14, 1993. See F. Fernández Segado, *Spanish National Report*, in Allan R. Brewer-Carías ed., *supra* note 3, p. 83.
[21] *ibid*.
[22] *ibid*, p. 730.
[23] Judgment of the Supreme Court of Canada on the Case №25285 Vriend v. Alberta, April 2, 1998.
[24] Annulment of a specific part/word of the law.

measure, which, in opposition to the will of the legislator, results in automatic expansion of the circle of persons envisaged by the disputed provision. For instance, the Constitutional Court of Hungary has expanded the provision, which entitled only a certain group of persons with the tax concession, through annulling specific word(s), to the other groups as well.[25] It is noted, that invalidating the provision through such measure is the expression of the act within the positive legislator powers.[26]

Apart from the fact that the model of "additive decision" is incompatible with the concept of negative legislator, in certain cases, it poses threat to the distribution of budgetary resources. On the one hand, for exercising the role of a guarantee of the protection of social rights and, on the other hand, for the purposes of avoiding the pressure on the budget without the adequate financial possibilities, in the mid-1990s, the Constitutional Court of Italy established a new form of decision-making, which is a specific type of "additive decisions" – creating the "additive decisions of principle" (additive di principio).[27] The main modification of this decision is that instead of a new normative regulation, it establishes the principles and leaves the legislator with the possibility to decide, how to amend the provision.[28] These are the very principles the lawmaker has to follow during the process of regulating the issue in a new way. In the additive decisions of principles, the disputed provision is declared unconstitutional and a term is indicated, within which the legislator has to adopt a new law.[29] It is disputable, whether the common court can use the principles established by the constitutional court for deciding the ongoing cases before the new provision is created. On the one hand, it is noted (including by the Constitutional Court), that the formulated principles by the Court are the roadmap, both for the legislator, in order to eliminate the unconstitutional regulation pursuant to the Court decision, and for the common court judges, to decide the disputes before them before the legislative interventions are made.[30] For example, the Constitutional Court of Italy by the Judgment N170/2014 has declared unconstitutional the rule, which established the mandatory divorce in the event one of the couples within the matrimony changed the gender. According to the Court, it was necessary to create the legal order, where such couples would be entitled to maintain the relationship if they wished and the Court addressed the legislator for adoption of a new regulation. Prior to establishing a new legal order for the homosexual couples (the institute of civil partnership), the Supreme Court of Italy used the principles established by the Constitutional Court and consid-

[25] Judgment of the Constitutional Court of Hungary №87/2008 [VI.188], See Lorant Csink, Jozsef Petretei, Peter Tilk, *Hungarian National Report*, in Allan R. Brewer-Carías ed., *supra* note 3, p. 581.
[26] *ibid.*
[27] Xenophon Contiades, *Constitutions in the Global Financial Crisis, A Comparative Analysis*, Routledge, 2016. p.111.
[28] Tania Groppi, *supra* note 18, p.108
[29] *ibid.*
[30] Allan R. Brewer-Carías, *supra* note 3, pp. 79-80

ered the matrimony of homosexuals real, before the civil partnership was regulated.[31] In opposition to this the majority of judges consider the legislator to be the sole addressee of the principles established by the Constitutional Court.[32] This latter position is somewhat flawed. On the one hand, the common court is dutybound to adopt decisions in compliance with the Constitution. The final and most authoritative source of defining the Constitution is the decision adopted by the Constitutional Court, which is why the execution thereof is obligatory to all, including to the common courts. On the other hand, the common court is not entitled to deny the exercise of justice with the reason of the lack of law and/or wait for the creation of new law indefinitely, considering the right of the claimant to have the dispute resolved within reasonable time. Therefore, when the legislator does not/cannot reflect the principles established by the Constitutional Court into the specific regulation, the adjudicator has to itself balance the legal vacuum through implementing the decision of the Constitutional Court directly. The user of the principles listed in the motivational part of the Constitutional Court judgment is not only the legislative body, but the common court as well, which is dictated from its primary function – to be the guarantee of the protection of human rights.

B. Declaring Law Incompliant with the Constitution without Invalidating/Annulling It

Germany is of the countries, where the institute of declaring the law incompliant with the Constitution is utilised.[33] Paragraph 2 of article 31 and paragraph 1 of article 79 of the Act on the Federal Constitutional Court of Germany establish the possibility of declaring the law or the part thereof incompliant with the Constitution in a way, when the disputed provision is not annulled.[34]

The Federal Constitutional Court of Germany uses the institute of declaring the law incompliant with the Constitution in two main instances: when on the one hand, there is a circumstance, where as the result of annulment through *ex tunc* effect the norm will depart (oppose) from the the constitutional legal order; while on the other hand, the right to equality is violated. In the latter instance, the elimination of unconstitutional regulation is possible through different methods, therefore, the Court transfers the authority of decision making to the legislator, which en-

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[31] Cecilia Siccardi , *Same-sex couples rights: the role of supranational and national Courts in order to fill legal vacuum in the Italian legal framework*, pp.1-5, accessible here <https://ddd.uab.cat/pub/poncom/2017/177321/Cecilia_Siccardi_LA_CREACION_JUDICIAL_DEL_DERECHO_Y_EL_DIALOGO_ENTRE_JUECES.pdf> [last visited on November 30, 2018].

[32] Tania Groppi, *supra* note 18, p.108.

[33] The Federal Constitutional Court of Germany used the institute of declaring the law incompliant with the Constitution first time in 1970 (BVerfG, Beschluss vom 11.05.1970), when it still has no legal grounds within the legislation of adjudication.

[34] Articles 31.2 and 79.1, Act on the Federal Constitutional Court of Germany. Accessible here: <https://www.gesetze-im-internet.de/englisch_bverfgg/englisch_bverfgg.html#p0192> [last visited on November 30, 2018].

tails invalidating the privilege or expanding such privilege to those persons, who were incorrectly excluded.[35]

Pursuant to the article 35 of the Act on the Federal Constitutional Court of Germany, the Court can decide within its judgment who shall execute its decision and, additionally, within a specific case, envisage the specific method for execution.[36] Pursuant to the mentioned article, when utilising the institute of declaring the law incompliant with the Constitution, the Constitutional Court makes the indication of the term, within which the legislator should amend the unconstitutional regulation. The length of such term is an assessable category and depends on the complexity, which the legislator may meet when adopting the new regulation.[37] According to the general rule, the provision which was declared unconstitutional, is not used for the legal relationships prior to adopting a new regulation.[38] However, the case law of the Court also includes the exemption from this rule. The Constitutional Court of Germany in one of its decisions declared unconstitutional the law regulating the inheritance tax, which envisaged the different models of evaluating the taxable property, thus causing different tax burdens. The Court declared the provision unconstitutional with regards to the right to equality and with the very decision, as an exception, stated that prior to adopting new regulations, the discriminatory law would continue to be in force. The Court justified the prolongation of the force of law with the purpose of safeguarding the principle of foreseeability.[39] It is notable, that the Federal Constitutional Court of Germany develops special approach towards the force of tax regulations provisions declared unconstitutional. Specifically, the Court defines that the expediency and the necessity of using the provisions declared unconstitutional are linked to the security of state financial sector and the high value thereof to the Country. The stable financial-budgetary planning of the State outweighs the violated basic human right.[40] Thus the "financial capacity", "unreasonable financial-budgetary outcomes" are the circumstances, with which the Constitutional Court validates using the unconstitutional provisions further, before the legislator establishes regulations in compliance with the Constitution.[41]

Apart from abovementioned instance, there are occasions, when the Federal Constitutional Court of Germany plays the role of a positive legislator. The expression of the positive legislator nature is vivid prior to adopting a new law by the legislator, during the interim period, when as an exception, the Constitutional Court authorises the discriminatory benefit to the circles not envisaged by the law. For instance, in one of its decisions the circumstances at hand for the

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[35] Ines Härtel, *German National Report*, in the book Allan R. Brewer-Carías, *supra* note 3, p.504.
[36] Articles 35, Act on the Federal Constitutional Court of Germany. *Supra* note 34.
[37] Ines Härtel, *German National Report*, in the book Allan R. Brewer-Carías, *supra* note 3, p.506
[38] *ibid*, p.505-506
[39] Decision of the Federal Constitutional Court of Germany, 1 BvL 10/02, November 7, 2006. Accessible here: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2006/11/ls20061107_1bvl001002en.html> [last visited on November 30, 2018].
[40] BVerfG, 2 BvL 5/91, September 25, 1992.
[41] BVerfG, 2 BvL 17/99, March 6, 2002.

adjudication entailed the right of a person within a civil partnership to adopt a child, who was already adopted by the partner prior to registering civil partnership.[42] The decision states, that failure to grant such right to the partner is not incompatible with the rights of personal freedom and family life, however it violates the right to equality, since, according to the law, a spouse within a matrimonial relationship has the right to adopt a child already adopted by another spouse and additionally, it was permitted to adopt a biological child of a partner within civil partnership. According to the Court indication, since the legislator had various possibilities to eliminate unconstitutional condition, it was permissible to declare the disputed provision unconstitutional. At the same time, prior to adopting the new regulation, considering the negative aspects of the discriminatory treatment, the Constitutional Court expanded the scope of the disputed provision and entitle a partner of the civil partnership to adopt a child already adopted by the second partner. Other judgments of the Federal Constitutional Court of Germany are similar to the mentioned one, when the expansion of the persons exercising the benefits as a temporary measure is based on the expected negative outcomes, which the recipients of the benefits would face by the invalidation thereof. In addition to the mentioned, the weight of financial load to the State stemming from the granting legal privilege to the unprivileged group, is also evaluated.[43] The same Court had previously established a criterion in its case law, the satisfaction of which allowed the expansion of the circle of persons envisaged by the disputed provision. The mentioned criterion entails a situation, when it is undoubtful, that the legislator, once analysing the article 3 (Right to Equality) of the Basic Law of Germany, would have adopted such provision and would directly expand the law over the group at hand.[44] The mentioned standard is uncertain, since it is not clear, when the will of the legislator is "undoubtedly" foreseeable, especially when the lawmaker has the possibility of adopting several different decisions in compliance with the Constitution.

In certain cases the Federal Constitutional Court of Germany expresses more daring, when with its decision, on the one hand, establishes the incompliance with the Constitution and, on the other hand, defines, that in the event the legislator does not adopt new regulation within the set time, the relevant bodies should use the regulations existing prior to the force of the disputed provision (old regulation).[45] Such approach of the Court entails the signs of abuse of power vested in it. The failure to adopt new regulation by the legislator will result in annulment of the discriminatory regulation, which is fully compliant with the mandate of the constitutional court, since the negative legislator has no legal leverage, other than invalidating the law. While after

[42] Decision of the Federal Constitutional Court of Germany, 1 BvL 1/11, February 19, 2013. Accessible here: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/02/ls20130219_1bvl000111en.html> [last visited on November 30, 2018].
[43] Decision of the Federal Constitutional Court of Germany 2 BvL 4/05, April 17, 2008.
[44] BVerfG, 1 BvR 241/56, February 21,1957.
[45] Decision of the Federal Constitutional Court of Germany, 1 BvL 16/95, October 29, 2002. Accessible here: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/02/ls20130219_1bvl000111en.html> [last visited on November 30, 2018].

the annulment of the provision, the regulating the legal relationship, with enforcing the old regulations or through adopting completely new ones, is the authority which is fully attributed to the legislative.

Within the above-mentioned context, the practice of the Swiss Federal Supreme Court is also notable, where the Court rejects the exercise of the positive legislative functions and declares the provision or part thereof unconstitutional. For instance, the mentioned Court, in its so called *Hegetschweiler* case established that the legislation of the Canton was discriminatory, since it obligated the couple within matrimonial relationship to pay more income and property tax, compared to the unmarried couple, who had similar financial resources. The Court decided that the main object of the complainants was the demand to create new law, which would ameliorate their state. It was stated, that the invalidation of the provision by the Supreme Court would cause the enforcement of the law existing before, unless the Court itself created new provision. The Court, based on its mandate, did not satisfy the complaint and refused to invalidate the provision. However, it declared the law incompliant with the Constitution and this way requested the legislator to eradicate the unconstitutional condition.[46]

III. The Case Law of the Constitutional Court of Georgia on Eliminating the Statutory Discriminatory Privileges

The Constitutional Court of Georgia has more than once evaluated the constitutionality of the provisions establishing discriminatory privileges with regards to the right to equality before the law. In this regard the practice of the Court is varied. The analysis of the judgments indicates, that the Court, during different periods of times, was at different stages of development. It is noteworthy that in the recent judgments the Court studies issues with more scrupulosity, whether the adjudication of a specific matter is within the competence of a "negative legislator".

Similar to other courts, the Constitutional Court of Georgia has also taken on the function of "positive legislator", however, through the abovementioned "additive decisions". One of the prominent examples is the case "Citizen of Georgia Tristan Mamagulashvili v. The Parliament of Georgia".[47] In this case the law, granting the status of a displaced person to only the persons displaced from the occupied territories of Georgia was disputed. The Claimant was disputing the words "from the occupied territories of Georgia" and argued that the status of displaced person and relevant social benefits had to be also possible for the persons forcefully displaced from other territories as well. The Court considered that the disputed words unjustifiably excluded the persons displaced by force from territories not occupied and, therefore were discriminatory. In the mentioned case through declaring the words void, the Court automatically expanded the

[46] Tobias Jaag, *supra* note 12, pp. 789-790.
[47] Citizen of Georgia Tristan Mamagulashvili v. the Parliament of Georgia judgement 1/3/534, the Constitutional Court of Georgia, June 11, 2013.

circle of subjects to the disputed provision and granted the status of a displaced person to all, who faced proven forceful displacement.

In the recent case law of the Court there are judgments, which establish new standard and the approach opposing to the criterion established in the case N1/3/534. In the case "Citizen of Georgia Lali Lazarashvili v. the Parliament of Georgia" the claimant (former judge) disputed her discriminatory exemption from the right to receive compensation in comparison to other judges of the Supreme Court.[48] The Claimant indicated during the trial, that she demanded the disputed provision to be declared unconstitutional in a way, that would grant her the right to receiving compensation similarly to other former judges. When deciding this case, the Constitutional Court defined, that "the demand of the Claimant is directed not to invalidating specific normative content of the disputed provision, but to creating new normative content. The Claimant, in reality does not consider the issuing of the compensation based on the disputed provision to be problematic but demands to expand the disputed provision and be used towards her as well. This demand is identical to creating positive prescription into the law, which is a part of the legislative process and is not an issue to be decided within the negative legislator competence. Therefore, the Constitutional Court is not entitled to satisfy the claim and grant the Claimant the right to relevant compensation.".[49] Although the mentioned case deserves positive assessment for not granting the Claimant the right not prescribed by the law, it is however the subject to criticism, for leaving the disputed provision without the assessment of its constitutionality.[50] Regardless the claim, it was relevant for the Court to assess the discriminatory nature of the disputed provision, especially, when the court recognised the differential treatment between the essentially equal persons, while the Parliament of Georgia was unable to point to a specific legitimate aim, justifying such differentiation. The mandate of the Constitutional Court is the starting point for deciding the issue. Exercising constitutional adjudication, unlike the disputes in the common court, does not serve merely the protection of the Claimant only within the specific case, but the Court also assesses the constitutionality of the normative act, which has the affect over undefined circle of persons. In this case the role of the Claimant and her specific case was in identifying the legal problem correctly and displaying the issue as a tangible/real problem. Therefore, once the Claimant demonstrates the legal issue correctly to the Court, the motivation/wish declared during the formation of the claim should not become a barrier to invalidating obviously unconstitutional provision and eliminating it from the societal life. In the case of Lali Lazarashvili, the obviously discriminatory provision was at hand, while as a result of the Court's decision, such regulation continued to exist.

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[48] Citizen of Georgia Lali Lazarashvili v. the Parliament of Georgia judgement 3/6/642, the Constitutional Court of Georgia, November 10, 2017.
[49] *ibid*, paragraph II-24.
[50] Regarding this issue, see the dissenting opinion of the member of the Constitutional Court of Georgia – Lali Papiashvili to the Judgment of the Constitutional Court Plenum N3/6/642, adopted on November 10, 2017.

It is noteworthy, that the standard established in the above mentioned case was strengthened by the Decision N2/1/760, where the demand of the Claimants (Members of the Supreme Council of Soviet Socialist Republic, elected before 1990) to receive compensation similarly to the Members of the former Supreme Council, was rejected based on the grounds, that the disputed issue was not within the authority of the Constitutional Court.[51] Thus the tendency of rejecting the expansion of the content of disputed provision through the function of positive legislator is a part of solid practice established recently by the Constitutional Court of Georgia.[52] At the same time the Court has established a new tool for invalidating the discriminatory law. The mentioned tool was first used by the Constitutional Court in the so called "Patriarchate Cases".[53] In both cases the Claimants were different religious confessions and they considered the disputed provisions to put the Georgian Apostolic Autocephalous Orthodox Church to be in a predominant position through various exemptions and, thus, were discriminatory. In the case of July 3, 2018 N1/2/671 the Claimant was disputing the constitutionality of Tax Code provision, which entitled the construction, restoration and painting the Temples and the Churches to be VAT exempt, if these works were contracted by the Patriarchate of Georgia. The Court considered the disputed provision establishing tax exemption to be granting the Patriarchate of Georgia in a predominant position in comparison to other religious organisations without rational justification and, thus, declared unconstitutional the normative content of the disputed provision, which entitled VAT exemption to the services of the construction, restoration and painting the Temples and the Churches, contracted only by the Patriarchate of Georgia. Similar situation was in the case N1/1/811 of July 3, 2018. Specifically, the disputed provision granted the right to receive state property freely only to the Georgian Apostolic Autocephalous Orthodox Church and other religious unions were left without such right. The Court considered this provision discriminatory and declared the normative content of the provision unconstitutional, which envisaged granting state property for free to only the Georgian Apostolic Autocephalous Orthodox Church. In both these cases, based on the paragraph 3, article 25, of the Organic Law of Georgia "On Constitu-

[51] Citizens of Georgia Vileni Alavidze, Tengiz Uchaneishvili, Irakli Motserelia, et al. (52 Claimants in total) v. the Parliament of Georgia Decision 2/1/760, the Constitutional Court of Georgia, February 22, 2018.

[52] Additionally see, the Constitutional Court of Georgia, Citizen of Georgia Avtandil Katamadze v. the Government of Georgia, Judgment 2/1/743, February 22, 2018; Citizen of Georgia Ana Maisuradze v. the Government of Georgia, Decision 2/8/881, March 22, 2018, paragraph II-8; The Group of Members of the Parliament of Georgia (Davit Bakradze, Sergo Ratiani, Roland Akhalaia, Levan Bezhashvili and others, in total 38 MPs) and the Citizens of Georgia Erasti Jakobia and Karine Shakhparoniani v. the Parliament of Georgia, Protocol on case 3/4/768,769, June 17, 2016, paragraph II-3; Citizen of Georgia Mzia Turashvili v. the Parliament of Georgia and the Minister of Justice of Georgia, Decision 2/17/1301, July 27, 2018.

[53] 1) The Judgment of the Constitutional Court of Georgia on Case 1/1/811, LEPL "Evangelical-Baptist Church of Georgia", LEPL "Evangelical Lutheran Church of Georgia", LEPL "The Highest Administration of all Muslims in Georgia", LEPL "The Redeemed Christian Church of God in Georgia" and LEPL "Pentecostal Church of Georgia" v. the Parliament of Georgia, July 3, 2018; 2) The Judgment of the Constitutional Court of Georgia on Case 1/1/671, LEPL "Evangelical-Baptist Church of Georgia", NNLE "Word of Life Church of Georgia", LEPL "Church of Christ", LEPL "Pentecostal Church of Georgia", NNLE "Trans-Caucasus Union of the Seventh-Day Christian-Adventist Church", LEPL "Caucasus Apostolic Administration of Latin Rite Catholics", NNLE "Georgian Muslims Union" and LEPL "Holy Trinity Church" v. the Parliament of Georgia, July 3, 2018.

tional Court of Georgia", the Court postponed invalidation of the disputed provisions till December 31, 2018.[54] The Court has postponed the invalidation of the disputed provisions in multiple other cases, however in these instances, the motivation for postponing is relevant. The Court defined, that the right to equality does not prohibit establishing a privilege (transfer of state property for free, using tax exemption) to a certain person and it does not prescribe for the duty to granting such privilege to any person either. The object of this right is equal treatment of essentially equal persons.

In the Judgments it was indicated that the equality can be reached by the legislator both through expanding the privileges to all substantially equal persons and through completely annulling such privileges. Therefore, the legislator had several alternatives to eliminating discrimination, which one the legislator chooses, is within its discretion. Additionally, the Court stated that the disputed provisions had granting character, thus annulling them at the moment of publishing the Constitutional Court Judgment would cause eliminating the possibility of the Georgian Apostolic Autocephalous Orthodox Church to exercise those privileges. In fact, the Constitutional Court granted the lawmaker with the term for making the amendments, while in case of failure to make them within this term, will cause the annulment of the disputed provisions and invalidating the privileges the Patriarchate has. It is obvious that the tool established by the Constitutional Court of Georgia is somewhat influenced by the institute of invalidating the provisions not compliant with the Constitution established in the adjudication of German Constitutional Court and the institute of "additive decision of principle" used in the practice of Italian Constitutional Court. However, there are relevant differences at hand. Namely, before the exhaustion of the term set by the Constitutional Court of Georgia, the disputed provision continues to be in force as before, despite its discriminatory nature. The regulation in force at the time of adopting the so-called Patriarchate Cases, as well as currently, the Constitutional Court does not have authority to make any decision, other than invalidating the unconstitutional provision.[55] At the same time, the freedom of action of the Court is limited with regards to defining the execution of its own decision. Specifically, the Constitutional Court can only declare the later term of the invalidation of unconstitutional provision or part thereof.[56] In such situation there is no procedural rule, which would ensure the suspension of the unconstitutional provision prior to the exhaustion of the term given to the legislative body. Thus, the force of the unconstitutional provision could continue for several months or even years. In all cases, maintaining the force of the unconstitutional provision undermines the aim of exercising constitutional control, creates basis for continuous violation of the right and incentivises the legislator to delay the amendments as much as possible. However, as an exception, the occasions, when the prolongation of the force

[54] Article 25.3, the Organic Law of Georgia "On Constitutional Court of Georgia", January 31, 1996, Parliamentary Herald, 001, 27.02.1996.
[55] Article 60.5, Constitution of Georgia, August 24, 1995. Herald of the Parliament of Georgia, 31-33, 24.08.1995.
[56] *Supra* note 55, also article 25.3, the Organic Law of Georgia "On Constitutional Court of Georgia", January 31, 1996, Parliamentary Herald, 001, 27.02.1996.

of unconstitutional provision for safeguarding more valuable interest are not excluded. Therefore, the Constitutional Court, as an exception should be able to prolong the term of the unconstitutional provision based on individual assessment of circumstances, but this cannot be a general rule. With this regard, the abovementioned rule established in the German constitutional adjudication can be a certain orientation model for the amendments in the Georgian law.

CONCLUSION

The analysis of the case law evidences, that there are various ways for eliminating privileges opposing equality. A part of the courts consider modification of the provision through the judiciary means and, thus, exercising the positive legislator function to be a tool for reinstating the equality between groups. The mentioned approach neglects the principle of division of powers and justifiably deserves criticism. The constitutional court, through invalidating the provisions, modifies legal order in any case, however, this is radically different from adding new constitutional rules. Creation of new rules from the constitutional court is justifiably only when this is the sole measure for safeguarding constructional rights. The specificity of the discriminatory provisions establishing statutory privileges is in the fact that the legislator can edit/amend them through various alternative ways, while selecting one of several constitutional solutions is beyond the adjudication field.

In opposition of this, invalidating discriminatory law by the constitutional court is within the negative legislator mandate, which, obviously, will cause elimination of the possibility to use the privileges by the privileged persons and the equality will be reinstated through this way. The position, according to which the full annulment of the provision by the Constitutional Court includes the signs of abuse of powers, is not to be shared.[57] The annulment of the provision is the sole measure, which the constitutional court can use for safeguarding the right to equality. It does not cause limiting the authorities of the legislative body in any way or diminishing it. The latter, unlike the constitutional court, has far more levers to equalise the persons and can, despite the annulment of the privileges by the court, create a new normative order and expand the privilege to all subjects. Part of the courts avoid invalidation of empowering provision, since it envisages possible damage to the privileged persons. Obviously, invalidating such provisions will result in failure to receive benefits by the privileged group, which could neglect the legitimate expectation towards the benefit. It is possible such legitimate expectation to be related to certain constitutional right, however, considering it within the view of the right to equality before the law will be incorrect. Another legal means, which can be used by the constitutional court, entails postponing invalidation. As it is stated in the legal literature, constitutional court expresses reverence towards the legislator's competence, allowing it to select one from several alternative

[57] Werner Heun, *supra* note 4, p. 206.

solutions and eliminate the inequal state.[58] Using the mentioned legal technique is fully within the margin of appreciation of the constitutional court and there is no duty to implement it. This model is utilised in the practice of legally developed states (Germany, Italy, Switzerland) and the Constitutional Court of Georgia has established it in its recent practice too, which should be positively assessed.

At the same time, the approach towards the discriminatory provisions establishing constitutional right is different. In the case of a constitutional right, the legislator/constitutional court does not have liberty to act and the only relevant solution is to grant the right to a person. Therefore, if the constitutional court invalidates the provision establishing the constitutional right in a discriminatory way, so that it expands the disputed provision and grants the constitutional right to the persons, limited from the possibility of exercising it, the court shall not invade the authority of the positive legislator.

[58] Werner Heun, *supra* note 4, p. 206.